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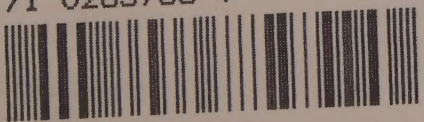

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THE LAW REPORTS

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1915.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

KING'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS IN

THE COURT OF CRIMINAL APPEAL

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

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OF

THE COURT OF APPEAL.

1915.

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OF

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE.

1915.

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122	foot-note (3)	add [1915] 1 K. B. 172.	
219	,, (1)	add 2 H. & N. 285.	
346	10 from bottom	*Gamble* v. *Johnson*	*Gamble* v. *Jordan*.
378	foot-note (7)	1 Y. & C.	1 Y. & C. Ex.
736	line 11	read *W. Shakespeare* and *T. Eastham* for the respondent.	
874	foot-note (1)	add [1915] 1 Ch. 58.	
926	,, (7)	L. R. 11 C. P.	L. R. 9 C. P.

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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

[IN THE COURT OF APPEAL.]

C. A.
1914
July 7, 8.

HURST *v.* PICTURE THEATRES, LIMITED.

Contract—Licence—Seat in Theatre—Forcible Removal of Spectator who paid for Seat—Assault—False Imprisonment—Right to Damages.

The purchaser of a ticket for a seat at a theatre or other similar entertainment has a right to stay and witness the whole of the performance, provided that he behaves properly and complies with the rules of the management.

The licence granted by the sale of the ticket includes a contract not to revoke the licence arbitrarily during the performance.

Where therefore the plaintiff, who had purchased a ticket for a seat at a cinema show, was forcibly turned out of his seat by the direction

C. A.
1914

HURST
v.
PICTURE
THEATRES,
LIMITED.

of the manager, who was acting under a mistaken belief that the plaintiff had not paid for his seat:—

Held by Buckley L.J. and Kennedy L.J. (Phillimore L.J. dissenting), that in an action for assault and false imprisonment the plaintiff was entitled to recover substantial damages.

Wood v. *Leadbitter* (1845) 13 M. & W. 838 discussed.

Decision of Channell J. affirmed.

APPEAL of the defendants from a decision of Channell J. at the trial with a special jury.

The plaintiff sued to recover damages for an alleged assault and false imprisonment.

The plaintiff stated in his evidence that, being attracted by an advertisement announcing that a picture of Lake Garda was being shewn at the defendants' cinema theatre at High Street, Kensington, he went to that theatre on March 17, 1913, for the purpose of seeing it. At the pay office he tendered a florin and asked for a sixpenny seat, and was given a metal check and the change; the check entitled him to an unreserved seat. He gave up his check at the door leading into the theatre, and was shown into a seat by a young woman with an electric torch. After the performance had proceeded for some little time, a girl came up and asked plaintiff if he had come in with a ticket, and, on his replying that he had, the girl went away. Shortly afterwards another girl came up and asked him to come out and see the manager, but he refused. Then a man in evening dress came up and asked him to come and see the manager, but he again refused. Then the manager himself came up and asked the plaintiff to come outside, and, on his refusing, said "Then we shall have to compel you." A porter or doorkeeper, who was sent by the manager, then asked the plaintiff to go out, which he refused to do. The porter went out and returned with a policeman, whom he asked to put the plaintiff out. This the policeman refused to do, suggesting that the porter should do it himself. The porter then made his way into the row of seats and, taking hold of the plaintiff under the arms, lifted him out of his seat. The plaintiff then walked quietly out. No unnecessary violence was used in thus ejecting the plaintiff.

The defendants justified their conduct on the ground that the plaintiff had not taken a ticket for that performance. They also

contended that they were entitled, without assigning any reason, to call on the plaintiff to leave the theatre and, if he declined, to forcibly remove him, relying on the authority of *Wood* v. *Leadbitter*. (1)

Channell J. was of opinion that *Wood* v. *Leadbitter* (1) was no longer good law, and held that a visitor to a theatre who had paid for his seat had a right to retain his seat so long as the performance lasted, provided he behaved quietly and complied with the regulations laid down by the management. He left to the jury the question whether the plaintiff had paid for his seat, and the jury found that he had, and assessed the damages at 150*l*.

The defendants appealed.

F. D. Mackinnon, for the defendants. *Wood* v. *Leadbitter* (1) is in point; the purchase of the ticket by the plaintiff only conferred on him a revocable licence, not a licence coupled with an interest. "Interest" means some interest in connection with some property on the defendants' land. There may be a breach of contract for which the plaintiff could recover damages, which would be the price paid by him for his ticket. The return of the money paid for the ticket is not a condition of revoking the licence. There may be a contract to allow the plaintiff to see the performance, but a breach of that would only give rise to an action for damages. A licence is revocable, though of course there may be an agreement not to revoke it. *Wood* v. *Leadbitter* (1) has been followed in *Taplin* v. *Florence* (2), *Adams* v. *Andrews* (3), and *Cornish* v. *Stubbs*. (4) In *Kerrison* v. *Smith* (5) the principle of *Wood* v. *Leadbitter* (1) was upheld, but it was held that there existed in the plaintiff a right to damages for breach of contract. A licence not coupled with an interest must be under seal in order to be irrevocable. The Judicature Acts have made no difference in the law, though no doubt Cozens-Hardy J. in *Lowe* v. *Adams* (6) said that, having regard to *Walsh* v. *Lonsdale* (7), it was very doubtful whether *Wood* v.

(1) 13 M. & W. 838.
(2) (1851) 10 C. B. 744.
(3) (1850) 15 Q. B. 284.
(4) (1870) L. R. 5 C. P. 334.
(5) [1897] 2 Q. B. 445.
(6) [1901] 2 Ch. 598.
(7) (1882) 21 Ch. D. 9.

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HURST v. PICTURE THEATRES, LIMITED.

Leadbitter (1) was still good law. Specific performance would not be granted of a contract like the present. The contract, looked at as a whole, must be on the one hand to allow the plaintiff to go into the theatre and remain there, and on the other hand to give a performance, and a Court of Equity would not grant specific performance of such a contract: *Malone* v. *Harris* (2); *Frith* v. *Frith.* (3) [He also cited *Butler* v. *Manchester, Sheffield and Lincolnshire Railway* (4); *Coleman* v. *Foster* (5); *Sealey* v. *Tandy* (6); Pollock on Torts, 9th ed., pp. 390—392.]

Hawke, K.C., and *Haydon*, for the plaintiff. The argument for the defendants is based on a misreading of *Wood* v. *Leadbitter* (1), which did not decide that a permission to enter on ground to see a horse-race was a mere licence, but that it was only a licence under the particular circumstances of the case. If it had been decided since the Judicature Acts, *Wood* v. *Leadbitter* (1) would not have been decided as it was; there is nothing in it, however, inconsistent with the right of the plaintiff to succeed. The effect of the transaction between the plaintiff and the defendants was to give the plaintiff a licence which was revocable subject to the terms of the express contract: *Lowe* v. *Adams* (7); *Jones* v. *Earl of Tankerville* (8); *Wilson* v. *Tavener.* (9) [They also cited *Hewlins* v. *Shippam* (10); *Devonshire (Duke of)* v. *Eglin* (11); *McManus* v. *Cooke.* (12)]

F. D. Mackinnon in reply.

BUCKLEY L.J. We have listened in this case to a very ingenious and interesting argument from Mr. Mackinnon, but, if I may borrow the words of Lord Esher in *Butler* v. *Manchester, Sheffield and Lincolnshire Railway* (4), it may have been quite right for the appellants' counsel to suggest the point, but when considered it is contrary to good sense. I may add that I think it is not only contrary to good sense, but contrary

(1) 13 M. & W. 838.
(2) (1859) 11 Ir. Ch. Rep. 33, at p. 39.
(3) [1906] A. C. 254.
(4) (1888) 21 Q. B. D. 207, 211.
(5) (1856) 1 H. & N. 37.
(6) [1902] 1 K. B. 296.
(7) [1901] 2 Ch. 598.
(8) [1909] 2 Ch. 440.
(9) [1901] 1 Ch. 578.
(10) (1826) 5 B. & C. 221.
(11) (1851) 14 Beav. 530.
(12) (1887) 35 Ch. D. 681, at p. 695.

also to good law as administered since the Judicature Act in this Court. The proposition which Mr. Mackinnon sets out to affirm is that if a man has paid for his seat at the opera, or the theatre, and has entered and taken his seat, and is behaving himself quite properly, it is competent to the proprietors of the theatre, merely because they choose so to do, to call upon him to withdraw before he has seen the performance for the enjoyment of which he has paid; that what he has obtained for his money is a mere revocable licence to come upon the land of the proprietor of the theatre, and that the proprietor may, simply because he chooses, say "I revoke your licence; go." If that proposition be true, it involves startling results. Kennedy L.J. has suggested one. Suppose that there be sitting in the stalls a man who is a constant patron of the opera or the theatre, to whom the management pay great deference, whether from his rank or his habit of attendance: he goes to the management and says, "I do not like the person sitting in front of me or next to me; ask him to go." It would be competent to the management to go to that person and say, "Please go; you cannot have your money back, go." Further, if the proposition is right, it follows that, having let the seat to A., the management may come to A. at the end of the first act or before and say, "I revoke your licence, go," and he has to go. The management may let the seat to B. for the rest of the performance, and at the end of the second act or sooner they may come to B. and say, "I revoke your licence, go." He will have to go, and they may let the seat a third time to C. Those consequences ensue from this proposition if it be well founded. It was for that reason I said at the outset of my remarks that it seems to me, when the point comes to be considered, it is contrary to good sense. Next it is to my mind contrary also to good law. The proposition is based upon the well-known decision in *Wood* v. *Leadbitter*. (1) Let me at the outset say what *Wood* v. *Leadbitter* (1) seems to me to have decided. It affirmed that a mere licence, whether or not it be under seal, by which I mean a licence not coupled with an interest or a grant whether it be under seal or not, is revocable. It affirmed also that if there be a licence coupled with an interest

(1) 13 M. & W. 838.

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Buckley L.J.

or coupled with a grant, it is not, or at any rate in general is not, revocable. For those two propositions, I read these two sentences from the case of *Wood* v. *Leadbitter* (1): "A mere licence is revocable; but that which is called a licence is often something more than a licence; it often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it, so as to defeat his grant, to which it was incident. It may further be observed, that a licence under seal (provided it be a mere licence) is as revocable as a licence by parol; and, on the other hand, a licence by parol, coupled with a grant, is as irrevocable as a licence by deed, provided only that the grant is of a nature capable of being made by parol." Those are propositions with which, as it seems to me, no one quarrels or can quarrel. *Wood* v. *Leadbitter* (2) rested, I think, upon one of two grounds—I will indicate them both—but I think it was the second of those which I am going to mention. The first ground is that the man who bought his ticket for the race meeting had not obtained any grant of the right to come during the currency of the meeting to see any particular spectacle from its commencement to its termination. If that were the ground, it would, I think, be erroneous. I conceive he had the right to see what was to be seen during the days covered by his ticket. But I do not think that was the ground on which the Court decided it. They decided it upon the ground, which will be found at p. 842 and onwards, that no incorporeal inheritance affecting land can be created or transferred otherwise than by deed, a proposition which was discussed with some elaboration in the course of the judgment. What Alderson B. was saying there was: this man has got no deed; he has got nothing under seal; he has therefore not got a grant; he cannot in this Court be heard to say he is a grantee, and because he is not a grantee he is a mere licensee, and being a mere licensee (whether it is under seal or not under seal does not make any difference) the licence is revocable.

Let me for a moment discuss this present case upon the footing that *Wood* v. *Leadbitter* (2) stands as good law at this date. I am going to say presently that to my mind it does not, but

(1) 13 M. & W. at p. 844. (2) 13 M. & W. 838.

suppose it does stand as good law at this date. What is the grant in this case? The plaintiff in the present action paid his money to enjoy the sight of a particular spectacle. He was anxious to go into a picture theatre to see a series of views or pictures during, I suppose, an hour or a couple of hours. That which was granted to him was the right to enjoy looking at a spectacle, to attend a performance from its beginning to its end. That which was called the licence, the right to go upon the premises, was only something granted to him for the purpose of enabling him to have that which had been granted him, namely, the right to see. He could not see the performance unless he went into the building. His right to go into the building was something given to him in order to enable him to have the benefit of that which had been granted to him, namely, the right to hear the opera, or see the theatrical performance, or see the moving pictures as was the case here. So that here there was a licence coupled with a grant. If so, *Wood* v. *Leadbitter* (1) does not stand in the way at all. A licence coupled with a grant is not revocable; *Wood* v. *Leadbitter* (1) affirmed as much.

So far I have been treating it as if *Wood* v. *Leadbitter* (1) were law as now administered in every Court. Let us see how that matter stands. *Wood* v. *Leadbitter* (1) was a case decided in a Court of law before the Judicature Act; it was a case to be decided, therefore, simply upon the principles which are applicable in a Court of law as distinguished from a Court of Equity. What was the principle which would have been administered in a Court of Equity in the year 1845, the date of *Wood* v. *Leadbitter* (1), or subsequently? For that I look at the decision of Wood V.-C. in *Frogley* v. *Earl of Lovelace.* (2) Other cases have been cited to us; I select this one because it seems to me to be the most pertinent, and to state the proposition in the most plain manner. The facts in *Frogley* v. *Earl of Lovelace* (2) were these: the defendant was lessor to the plaintiff of certain lands for twenty-one years; he had executed a lease to him, but previously to the execution of the lease this memorandum was indorsed, but was not under seal: "It is hereby agreed that [the lessee] shall have the exclusive right of sporting over, and

(1) 13 M. & W. 838. (2) (1859) John. 333.

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killing the game upon, the lands included in the within-written lease, and also upon the lands adjacent thereto belonging to the said Earl" (describing such adjacent lands) "during the continuance of the said term, if the said Ralph Frogley shall so long live; he undertaking to keep and leave a fair stock of game thereupon, and not to keep such an excessive quantity of hares and rabbits as to do damage to the said Earl or his under-tenants in the neighbourhood." On February 9, 1859, the lessor served the lessee with a notice that after that date he revoked, rescinded, and put an end to that agreement. The question was whether he could do so or not. The suit was brought in a Court of Equity for specific performance, for the execution of a proper instrument under seal giving effect to the document which was not under seal. The plaintiff moved for an injunction as prayed by his bill, namely, an injunction to give effect to his rights until that deed had been executed, and that was the matter which came before the Vice-Chancellor. At p. 339 the Vice-Chancellor says this: "The memorandum is a mere writing not under seal and the case of *Wood* v. *Leadbitter* (1) has decided that, in order to acquire a right such as that which is here claimed by the plaintiff, an instrument under seal is necessary; and that, at law, an instrument purporting to grant such a right, though given for a valuable consideration, is revocable at any time, and without paying back the money. At law, therefore, the plaintiff has no remedy until the defendant shall have executed a deed containing a proper and legal grant of the exclusive right of sporting in accordance with the terms of the agreement." Finding, therefore, that the plaintiff's interest was incapable of being supported at law upon the footing of *Wood* v. *Leadbitter* (1), he gave him relief in equity, and in so doing he says: "It appears to me that the plaintiff is clearly entitled to an injunction in the interval until the defendant shall have executed a proper legal grant of the right claimed by the plaintiff." What could be plainer? According to *Wood* v. *Leadbitter* (1) the plaintiff would have been dismissed from a Court of Law; he would have had no case. He comes into a Court of Equity, and he obtains relief in equity because he would

(1) 13 M. & W. 838.

have no remedy at law, and his remedy is given until he has been clothed with such rights under a proper instrument as that he has a remedy at law, and then he is left to his legal rights. I will read a few words from the judgment of Kay J. in *McManus* v. *Cooke*. (1) Kay J. says: "*Hewlins* v. *Shippam* (2), *Wood* v. *Leadbitter* (3), and other authorities at common law were cited, and it was argued that the right claimed could only be granted by deed, and that therefore the licence was revocable; but this common law doctrine was not allowed to prevail in equity." As I have shown, in *Frogley* v. *Earl of Lovelace* (4) it was not allowed to prevail in equity.

The position of matters now is that the Court is bound under the Judicature Act to give effect to equitable doctrines. The question we have to consider is whether, having regard to equitable considerations, *Wood* v. *Leadbitter* (3) is now law, meaning that *Wood* v. *Leadbitter* (3) is a decision which can be applied in its integrity in a Court which is bound to give effect to equitable considerations. In my opinion, it is not. Cozens-Hardy J., as he then was, the present Master of the Rolls, in the case of *Lowe* v. *Adams* said this (5): "Whether *Wood* v. *Leadbitter* (3) is still good law having regard to *Walsh* v. *Lonsdale*" (6) —which is a decision of the Court of Appeal—"is very doubtful." The present Lord Parker, then Parker J., in the case of *Jones* v. *Earl of Tankerville* says this (7): "An injunction restraining the revocation of the licence, when it is revocable at law, may in a sense be called relief by way of specific performance, but it is not specific performance in the sense of compelling the vendor to do anything. It merely prevents him from breaking his contract, and protects a right in equity which but for the absence of a seal would be a right at law, and since the Judicature Act it may well be doubted whether the absence of a seal in such a case can be relied on in any Court." What was relied on in *Wood* v. *Leadbitter* (3), and rightly relied on at that date, was that there was not an instrument under seal, and therefore there

(1) 35 Ch. D. 681.
(2) 5 B. & C. 221.
(3) 13 M. & W. 838.
(4) John. 333.
(5) [1901] 2 Ch. 598, at p. 600.
(6) 21 Ch. D. 9.
(7) [1909] 2 Ch. 440, at p. 443.

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was not a grant, and therefore the licensee could not say that he was not a mere licensee, but a licensee with a grant. That is now swept away. It cannot be said as against the plaintiff that he is a licensee with no grant merely because there is not an instrument under seal which gives him a right at law.

There is another way in which the matter may be put. If there be a licence with an agreement not to revoke the licence, that, if given for value, is an enforceable right. If the facts here are, as I think they are, that the licence was a licence to enter the building and see the spectacle from its commencement until its termination, then there was included in that contract a contract not to revoke the licence until the play had run to its termination. It was then a breach of contract to revoke the obligation not to revoke the licence, and for that the decision in *Kerrison* v. *Smith* (1) is an authority. So far I have dealt with the law.

I will say a few words as to what were the facts in this case. The plaintiff entered this picture theatre and paid 6*d.* for his admission. The defendants denied that he had paid, and that was the question for the jury in the case. The jury have given the plaintiff a verdict; they have found that he did pay this 6*d.*, and that fact is not now in contest before us. Alleging that the plaintiff had not paid, the attendant at the theatre, and then the manager, called upon him to go out of the theatre, treating him as a fraudulent person, a person who had come in without payment. There was some conversation with, I think, one attendant and a second attendant, and then the manager came, and the manager called upon him to go out. A police constable was then called in, and in the presence of the audience the man was again called upon to come out. The police constable was asked to take him out, but declined and said the doorkeeper could take him out if he were so minded. Thereupon the doorkeeper laid hands upon him to remove him by force, and the plaintiff, as a reasonable man, yielded at once to the man and went out. There was in law an assault, and an assault of a grievous kind. He was exposed to indignity, and it is for that indignity, I suppose, that the jury have given him a verdict for 150*l.*

(1) [1897] 2 Q. B. 445.

The defendants had, I think, for value contracted that the plaintiff should see a certain spectacle from its commencement to its termination. They broke that contract and it was a tort on their part to remove him. They committed an assault upon him in law. It was not of a violent kind, because, like a wise man, the plaintiff gave way to superior force and left the theatre. They sought to justify the assault by saying that they were entitled to remove him because he had not paid. He had paid, the jury have so found. Failing on that question of fact, they say that they were entitled to remove him because his licence was revocable. In my opinion, it was not. There was, I think, no justification for the assault here committed. Under the circumstances it was for the jury to give him such a sum as was right for the assault which was committed upon him, and for the serious indignity to a gentleman of being seized and treated in this way in a place of public resort. The jury have found that he was originally in the theatre as a spectator, that the assault was committed upon him, and that it was a wrongful act.

I think that the appeal which has been brought before us, and which is founded simply upon the question of law which I have discussed at the beginning of this judgment, fails and must be dismissed with costs.

KENNEDY L.J. I am of the same opinion. The facts as well as the law have been very fully dealt with, and I do not propose to add much. We have heard a very careful and interesting argument chiefly affecting the character of *Wood* v. *Leadbitter*. (1) Personally, I am indifferent as to whether that case has or has not been subjected to some slight imputations upon its character. It was a decision of a great Court, and I desire to treat it myself with the utmost respect, but I do not think it governs this case. The plaintiff was in this picture theatre and was assaulted and subjected to indignities which were entirely unjustifiable by those who handled him and compelled him to go out. What is his position? He says "I was there by right; I was occupying a seat for which I had paid in a place of public entertainment," and he says that if you pay a certain price you must be entitled

(1) 13 M. & W. 838.

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to the possession of the seat. The seat, I understand, is one which he may choose; it is not a reserved seat, but a seat which he entered. He did enter that seat, and they took him out again practically, in the eyes of the law, by force. Now the defendants have to justify that, and they justify it by saying that there is a point of law apart from the defence in fact which failed, namely, that he was not there by right because he had not fulfilled the condition of payment. The defendants say through their counsel, "In point of law, even if you did pay, we had a right to turn you out, although you were behaving in the way in which those who go into places of public entertainment are bound (by implied contract at any rate) to behave." They say, "In law we are justified because all that you had was a revocable licence. When we use the words 'revocable licence,'" say the defendants, "we mean that we can at will require you to leave this building, and you are bound to obey. Therefore, as we can legally require you to do so, you must go quietly, and if you do not go quietly we are right, using no more force than is necessary, in putting you out." For the reasons I ventured to refer to in the course of the argument by way of illustration (which have been still better illustrated by Buckley L.J. in his judgment) such an astounding conclusion is one which one would require as a matter of law, I think, and as a matter of common sense, to be strictly justified. The justification is hung entirely on the peg of the doctrine which is said to be the doctrine established by the considered decision of the Court of Exchequer in the year 1845. With regard to that decision, I am not going myself to say, and I should feel I was presumptuous in saying, that it was not at the time a perfectly good decision. It has been quoted frequently with respect, and I am not going to say a word in diminution of that respect. But what was the decision? It is stated, and I think with perfect correctness, at the bottom of p. 838: "A right to come and remain for a certain time on the land of another can be granted only by deed; and a parol licence to do so, though money be paid for it, is revocable at any time, and without paying back the money."

Now I hold that in this case, as Buckley L.J. has intimated, the contract would not be correctly expressed by saying that it

was a right to come and remain for a certain time on the land of another. In this case I think there was, if you were to put the contract into terms, a contract that there should be an irrevocable right to remain until the conclusion of the performance. I do not lay stress upon that point, and for this reason, that in the case of *Wood* v. *Leadbitter* (1) the plaintiff, who was in a particular part of the racecourse, might have said that he had the same sort of contract, but he did not say it, and therefore I will leave that matter alone. What was decided by the case was that the grant, to be effectual and irrevocable, must be a grant valid in law, and such a grant could only be made by deed. Passages have already been quoted from that judgment, and I am not going to take up time by quoting them again, but I think that it is important to remember that at the very commencement of the judgment of Alderson B. he points out that the question arose upon the plea and its replication, and the replication, he points out, is that: "At the time of such removal, the plaintiff was in the said close by the leave and licence of Lord Eglintoun." It was not there suggested by the plaintiff, "My right to remain is not merely by leave and licence of Lord Eglintoun; I have an implied contract that I should be there and that contract is not subject to revocation." Therefore, as I say, one must deal with that case upon the pleading, and upon that pleading the judgment of the Court cannot be put more specifically or more correctly than in the passage I have quoted from the head-note. There must be a grant by deed; if you show only a parol licence, you have no case. There are several passages which show that. When the learned Alderson B. is commenting on the case, from the decision in which the Court differed, of *Tayler* v. *Waters* (2), he says at p. 854: "It was taken for granted that, if the Statute of Frauds did not apply, a parol licence was sufficient, and the necessity of an instrument under seal, by reason of the interest in question being a right in nature of an easement, was by some inadvertence kept entirely out of sight." There is language used in the passage on p. 845 which has been already cited by Buckley L.J. to the same effect, and which states this in one sentence: "But where there is a licence by parol, coupled with a parol

(1) 13 M. & W. 838. (2) (1817) 7 Taunt. 374.

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grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the licence is a mere licence; it is not an incident to a *valid* grant, and it is therefore revocable." Does that apply now? Since the Judicature Act there is no doubt we have to apply the principles of equity, and according to those principles there was in this case that which was not granted by a deed, and which need not be granted by deed, and therefore there was that which is valid now in equity as a good title upon which this gentleman, the plaintiff, being in possession of a seat, had a right to stay and say "It is no use your saying to me I am obliged to go because I have not got in the language of *Wood* v. *Leadbitter* (1) a grant by deed; this is an interest which, whether you call it an easement or not, is an interest which I can now acquire in equity by parol, and I have that interest."

The passage which has been quoted from Parker J.'s judgment in *Jones* v. *Earl of Tankerville* (2) states that which I believe to be right, namely, that an injunction restraining the revocation of the licence, when it is revocable at law, may in a sense be called relief by way of specific performance, but it is not specific performance in the sense of compelling the vendor to do anything. It merely prevents him from breaking his contract, and protects a right in equity which, but for the absence of a seal, would be a right at law. There is also the judgment of Kay J. in *McManus* v. *Cooke*. (3) The learned judge sets out a number of propositions established by the authorities in regard to these questions, and amongst other things he says that the equity applies "wherever the defendant has obtained and is in possession of some substantial advantage under a parol agreement which, if in writing, would be such as the Court would direct to be specifically performed. The doctrine applies to a parol agreement for an easement, though no interest in land is intended to be acquired."

I have come to the conclusion, therefore, putting aside altogether the question what the contract was in this case, that in fact to treat it upon the basis of *Wood* v. *Leadbitter* (1) being

(1) 13 M. & W. 838. (2) [1909] 2 Ch. at p. 443.
(3) 35 Ch. D. at p. 697.

good law is wrong because of more modern legislation. It is no longer good law to do such an act as the defendants have done here.

I think I ought to add that that which we are now asserting in this Court has been recognized in the passage to which I referred in the course of the argument from Sir Frederick Pollock's work upon Torts. He points out carefully at p. 390, referring to *Wood* v. *Leadbitter* (1) and *Tayler* v. *Waters* (2), which was there overruled, that even in such a case, where there had been part performance, specific performance is sometimes decreed, and equitable rights are now enforced by all the Courts. (See also Roscoe's Nisi Prius, vol. ii., p. 930.) It seems to me that there was here a good equitable right which rendered the act of the defendants in the present case bad in law.

PHILLIMORE L.J. All one's sympathy in this case must be for the plaintiff, and if he had failed in getting his judgment for the sum given to him by the jury for the unjustifiable assault, I should have thought at any rate he ought to have had judgment for his 6*d*., and very properly, as the issue which was raised reflected upon his character, with costs, and I should not have seen any reason to differ from a learned judge who certified for High Court costs. But one must not allow one's sympathy for him to make one decide that which one does not think good law. Although I express my opinion with the very greatest diffidence, and put it as will be seen later in the nature of doubts, more as if the matter were non-proven than as a decision, I still feel bound to express those doubts. My diffidence arises, first of all, from the fact that I am differing from an opinion of Channell J., from whom, in a long course of simultaneous judicial career, I hardly ever found myself in disagreement; secondly, of course, and even more strongly, because my brethren here feel so clearly about the case.

With regard to the results which are supposed to flow from an opposite conclusion, I can only say that if people are impracticable and unbusinesslike, very serious results would flow in either direction. Certainly I should advise the owners

(1) 13 M. & W. 838 (2) 7 Taunt. 374.

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of places of entertainment, and still more the owners of picture theatres who have not the remedy of refusing to continue the performance if a person is impracticable, to put conditions upon their tickets in future.

Now I start by saying that I think the circumstances in this case make it indistinguishable from *Wood* v. *Leadbitter* (1)—not only from *Wood* v. *Leadbitter* (1), but from *Tayler* v. *Waters* (2), which was overruled by *Wood* v. *Leadbitter* (1), and *Malone* v. *Harris* (3), which is, I think, a case of great importance, and which approves of *Wood* v. *Leadbitter* (1), and approves of the overruling of *Tayler* v. *Waters* (2) by *Wood* v. *Leadbitter*. (1) In all these cases for a sum of money a ticket is given which purports to admit to the defendant's close for the purpose of enabling the person admitted, not to have any particular spot which could be said to be in any sense demised to him, but to stand or sit, or stand and sit, during the progress of an entertainment which may be conducted in the close, or visible from the close. It seems to me the circumstances, therefore, are indistinguishable from *Wood* v. *Leadbitter*. (1) My second stage is that *Wood* v. *Leadbitter* (1), when it was decided, was good law. I am aware that it is only a decision of the Court of Exchequer, and not of the Court of Exchequer Chamber, but it received very shortly afterwards the approval of both the other Courts, and therefore has the weight of all the common law judges at the time. It was decided in 1845. Incidentally, no doubt, it was referred to and approved in 1850 in *Adams* v. *Andrews* (4) by the Court of Queen's Bench. It was referred to and approved in 1851 in *Taplin* v. *Florence* (5) by the Court of Common Pleas, and a later approval of the same case is furnished by the case of *Cornish* v. *Stubbs* (6) in 1870, when the great weight of Willes J. is added. It was also approved (I am speaking again before the Judicature Act) in *Malone* v. *Harris* (3), where the Lord Chancellor of Ireland states that an action at law had been brought but had failed, and rightly failed, on the ground that the case was indistinguishable from *Wood* v. *Leadbitter* (1) and from *Tayler* v. *Waters* (2), which *Wood* v.

(1) 13 M. & W. 838.
(2) 7 Taunt. 374.
(3) 11 Ir. Ch. Rep. 33.
(4) 15 Q. B. 284.
(5) 10 C. B. 744.
(6) L. R. 5 C. P. 334.

Leadbitter (1) had very properly overruled. Therefore I think the weight of *Wood* v. *Leadbitter* (1) was exceedingly great. The equity cases—I am speaking of the equity cases before the Judicature Act—do not, in my opinion, detract in any way from *Wood* v. *Leadbitter*. (1) All the cases which have been cited relate to an interest given in land, and the whole point of the decision in *Wood* v. *Leadbitter* (1) was that the grant of the ticket there gives no interest in land, but only a licence,—it matters not whether by deed or otherwise—all licences, whether by deed or otherwise, being at law revocable. Not only has *Wood* v. *Leadbitter* (1) received that approval before the Judicature Act, but to my mind it has been inferentially approved even in the case of *Butler* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (2), and certainly approved by Collins J. in the case of *Kerrison* v. *Smith.* (3) In *Butler* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (2) it was only approved in the sense that it was distinguished, but without going into detail about it, there are expressions of each of the three judges, the Master of the Rolls, Lindley L.J., and perhaps most clearly Lopes L.J., which show the grounds upon which they distinguish it without detracting from its value.

The next point I have to consider is, has the Judicature Act made a difference? If it was a grant of an interest in land, yes. If it was not a grant of an interest in land, no. *Walsh* v. *Lonsdale* (4) is a case very much in point. I assume for this purpose that the law may be taken to be stated by the chief member of the Court, the Master of the Rolls (Sir George Jessel), the other learned judges only dealing with details. He puts the point with that breadth and clearness which everybody who has pleaded before that great judge, or has read his judgments, knows was his characteristic. In the course of the argument he said: "A tenant holding under an agreement for a lease of which specific performance would be decreed, stands in the same position as to liability as if the lease had been executed. He is not since the Judicature Act a tenant from year to year, he holds under the agreement, and every branch of the Court must now

(1) 13 M. & W. 838.
(2) 21 Q. B. D. 207.
(3) [1897] 2 Q. B. 445.
(4) 21 Ch. D. 9.

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give him the same rights." Still more clearly in his judgment he says: "There is an agreement for a lease under which possession has been given. Now since the Judicature Act the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it." In other words, the man has the estate which equity thinks he ought to have. That has no bearing on the question if there is no estate, and no interest in land given by the document relied on. Assume, therefore, that there was a contract, and assume that the purported revocation was a breach of the contract, and assume that of which I am not certain, that equity would give specific performance of such a contract, still specific performance does not necessarily put the man before he has got specific performance in the legal possession which he gets after he has got specific performance. It does in the case of interests in land because the interest in land now is the interest which he had in equity before. But it does not necessarily do so with regard to interests arising by reason of a contract. I do not say that on my own authority; it appears to be the view taken by two text-book writers of importance, Clerk and Lindsell, and Sir Frederick Pollock. I should not myself have much relied on text-book writers, but I have the example of Collins J. for citing the one, and Kennedy L.J. for citing the other. Collins J. in *Kerrison* v. *Smith* (1) puts it in this way: "It was conceded that the grantor has a right to revoke a licence, but the point set up by the plaintiff, that there was a contract, for the breach of which the plaintiff was entitled to recover damages, was never properly dealt with. There appears to be no case in which the point has been specifically raised and decided, as to whether there is a right to maintain an action for breach of contract, if a licence is revoked, although there is a right to revoke the licence, but on principle it seems to me that the two rights are compatible with one another." That is to say the licence can be revoked, in which case the man becomes a trespasser if he stays on, but nevertheless there

(1) [1897] 2 Q. B. 445.

may be a contract for which the man may recover damages. I do not say myself that is necessarily sound law; that is the view taken by Collins J. Then at the end of his judgment he quotes Clerk and Lindsell: "Such a licence, even though it may have been made by deed and for valuable consideration, is revocable at any time by the licensor; the licensee cannot after revocation justify entering upon the land for the purpose of using the privilege; his only remedy against his licensor, where the revocation is wrongful, is upon the contract." Sir Frederick Pollock is even more explicit at p. 390: "The revocation of a licence is in itself no less effectual, though it may be a breach of contract. If the owner of land or a building admits people thereto on payment, as spectators of an entertainment or the like, it may be a breach of contract to require a person who has duly paid his money and entered to go out, but a person so required has no title to stay, and if he persists in staying he is a trespasser. His only right is to sue on the contract, as he clearly may do where a contract exists: when, indeed, he may get an injunction and so be indirectly restored to the enjoyment of the licence." I just repeat some words for particular reasons: "but a person so required has no title to stay, and if he persists in staying, is a trespasser." That is the issue to be determined in this case. The action is for assault, and the defence is: "You were a trespasser; you had a warning to go, and I removed you, using no more force than necessary." The question is whether the man was a trespasser. Therefore it does not follow, because specific performance could be obtained of the contract, that till the contract has been specifically performed the man has the rights which he will get when the contract has been given specific performance.

However, there is a possible view of this case which may not make it necessary to take that view. I am not at all sure (here I think I differ from Collins J.) that the real construction of the case of *Wood* v. *Leadbitter* (1) is not that the contract is not that which people think it was. I am not at all sure that the contract must not be said to be this: "I cannot grant you a licence because I cannot bind myself not to make it revocable,

(1) 13 M. & W. 838.

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not even if I do so by deed; therefore I do not because the law does not allow me to do so. The real contract is this, in consideration of such a sum of pounds, shillings, and pence I give you a licence to enter my close and to remain there during a certain entertainment. If I revoke the licence for other than good cause, I will repay you the money you have paid." I put carefully "during the entertainment"; I think, unless the licensor lets the man stop until the end, he must return him all his money, and I throw out for consideration whether the real virtue of the decision in *Wood* v. *Leadbitter* (1) is not that this is the nature of this contract. However that may be, not being able to distinguish this case from *Wood* v. *Leadbitter* (1), and thinking *Wood* v. *Leadbitter* (1) was and remains good law, and thinking that the equity doctrines do not affect it, I am obliged to come to the conclusion, which I have tried to express with clearness, and I hope to be considered to express with diffidence, that my present view, unaided by further discussion, is that the appeal ought to be allowed.

Appeal dismissed.

Solicitors for plaintiff: *Rooks, Spiers, Wales & Ward.*
Solicitors for defendants: *Simmons & Simmons.*

(1) 13 M. & W. 838.

W. J. B.

[IN THE COURT OF APPEAL.]

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May 21, 29.

In re THE VEXATIOUS ACTIONS ACT, 1896.
In re BERNARD BOALER.

Practice—Vexatious Actions—Order that no Legal Proceedings be instituted without Leave of High Court—Criminal Proceedings—Vexatious Actions Act, 1896 (59 & 60 *Vict. c.* 51), *s.* 1.

By s. 1 of the Vexatious Actions Act, 1896, "It shall be lawful for the Attorney-General to apply to the High Court for an order under this Act, and if he satisfies the High Court that any person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground for instituting such proceedings, whether in the High Court or in any inferior Court, ... the Court may . . . . order that no legal proceedings shall be instituted by that person in the High Court or any other Court, unless he obtains the leave of the High Court or some judge thereof, and satisfies the Court or judge that such legal proceeding is not an abuse of the process of the Court, and that there is prima facie ground for such proceeding."

Upon the application of the Attorney-General a Divisional Court made an order under the above section that no legal proceedings should be instituted by B. in the High Court or in any other Court unless he obtained the leave of the High Court or some judge thereof and satisfied the Court or judge that the legal proceeding was not an abuse of the process of the Court and that there was a prima facie ground for the proceeding :—

Held by Kennedy L.J. and Scrutton J. (Buckley L.J. dissenting), that the words "legal proceedings" in s. 1 do not include criminal proceedings, and that therefore the order of the Divisional Court was no bar to an application to a magistrate for a summons by B. upon an information sworn by him, nor to the presentment of an indictment by B. to a grand jury in respect of certain misdemeanours, without the leave of the High Court or a judge thereof.

Decision of Divisional Court [1914] 1 K. B. 122 affirmed.

Appeal from the decision of a Divisional Court (Darling, Bankes, and Lush JJ.), reported [1914] 1 K. B. 122.

On December 17, 1910, a Divisional Court, upon the application of the Attorney-General, made the following order against the applicant, Bernard Boaler, under s. 1 of the Vexatious Actions Act, 1896 : "It is ordered that no legal proceedings shall be instituted by the said Bernard Boaler in the High Court or in any other Court unless he obtains the leave of the High Court

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or some judge thereof and satisfies the Court or judge that such legal proceeding is not an abuse of the process of the Court and that there is a prima facie ground for such proceeding."

It appeared from an affidavit made by the applicant that on May 21, 1913, the applicant "gave the clerk of the Central Criminal Court statutory notice in writing that" he "purposed at the next ensuing sessions to be held on May 27, 1913, to present a bill of indictment to the grand jury against John Esson & Son, Limited, in respect of certain misdemeanours committed within the jurisdiction of the Central Criminal Court and over which the Courts of summary jurisdiction had no jurisdiction to hear and determine or to commit for trial."

On May 28, 1913, he was requested by an official in the indictment office of the Central Criminal Court to go to the Recorder, Sir Forrest Fulton, who was sitting in Court. He went, and the Recorder referred to the Vexatious Actions Act, 1896, and expressed the opinion that the order of December 17, 1910, prohibited the applicant from instituting any legal proceedings unless he had obtained the leave of the High Court or some judge thereof to present the bill of indictment to the grand jury; that he could not give the applicant leave because he was not a judge of the High Court; and finally said that the applicant could not institute criminal proceedings without the leave of the High Court or of some judge thereof. The applicant had previously applied to a magistrate for a summons upon an information sworn by him, but the magistrate refused the application without giving any reasons. For the purposes of this motion, however, the Court assumed that the refusal was upon the ground that the order of December 17, 1910, was a bar to the application.

The applicant having subsequently obtained leave of a Divisional Court, served notice of motion upon the Attorney-General, John Esson & Son, Limited, Edward Kennedy Howes, the liquidator thereof, and certain other persons against whom he alleged the commission of certain criminal offences, for an order (inter alia) that the order of December 17, 1910, restraining him from instituting legal proceedings unless he complied with the conditions imposed by it, might be limited to civil legal

proceedings, or in the alternative for an order declaring that the power given to the High Court by the Vexatious Actions Act, 1896, to forbid the institution of legal proceedings without leave of the Court only applied to civil proceedings and that the Court had no power to abrogate the applicant's common law right as a citizen to prefer a bill of indictment to the grand jury of the Central Criminal Court for felony or misdemeanour.

By s. 1 of the Vexatious Actions Act, 1896 (59 & 60 Vict. c. 51), it is provided that "It shall be lawful for the Attorney-General to apply to the High Court for an order under this Act, and if he satisfies the High Court that any person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground for instituting such proceedings, whether in the High Court or in any inferior Court, and whether against the same person or against different persons, the Court may, after hearing such person or giving him an opportunity of being heard, after assigning counsel in case such person is unable on account of poverty to retain counsel, order that no legal proceedings shall be instituted by that person in the High Court or any other Court, unless he obtains the leave of the High Court or some judge thereof, and satisfies the Court or judge that such legal proceeding is not an abuse of the process of the Court, and that there is prima facie ground for such proceeding. A copy of such order shall be published in the *London Gazette*."

The Divisional Court (Darling and Lush JJ., Bankes J. dissenting) held that the words "legal proceedings" in s. 1 did not include criminal proceedings, and that therefore the order of December 17, 1910, was no bar to an application to a magistrate for a summons by the applicant upon an information sworn by him, nor to the presentment of an indictment by the applicant to a grand jury in respect of the alleged misdemeanours, without the leave of the High Court or a judge thereof.

The Attorney-General appealed.

Sir S. O. Buckmaster, S.-G., and *Branson*, for the appellant. It is difficult for the respondent to contend that a criminal proceeding is not a "legal proceeding." It is important to see what

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is meant by the "High Court." By s. 29 of the Judicature Act, 1873, the definition includes Courts of assize. It is true that "action" is defined in s. 100 of that Act, and that it does not include "a criminal proceeding by the Crown"; but that is immaterial, for the word "action" does not occur in the Vexatious Actions Act, 1896. In Bacon's Abridgment, tit. Action, actions are divided into criminal and civil; and in Comyn's Digest, tit. Action, it is said that "there are two kinds of action, placita coronae, et civilia." The expression "legal proceedings" is used instead of "actions" intentionally in order to make the operation of the statute as wide as possible.

[SCRUTTON J. Is "institute" an appropriate word to use with reference to criminal proceedings?]

No doubt "commence" is a more ordinary expression, but "institute" is also used: see Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), s. 9, sub-s. 1, where the expression "prosecutor" is defined as including any person who appears to the Court to be a person at whose instance "the prosecution has been instituted." It is true that the short title "The Vexatious Actions Act, 1896," is more applicable to civil than to criminal proceedings, but a short title is not conclusive nor indeed relevant except where the statute is ambiguous. It is a mere label, and cannot cut down the enacting part of the statute: *Vacher & Sons* v. *London Society of Compositors.* (1) The full title "An Act to prevent Abuse of the Process of the High Court or other Courts by the Institution of Vexatious Legal Proceedings" can be properly used to include criminal proceedings. Constant ex parte applications for criminal process would be both vexatious and harassing. [They also cited *Reg.* v. *Yates* (2); *Reg.* v. *Adamson* (3); *Ex parte Wason.* (4)]

The Respondent in person. There is no provision in the Vexatious Actions Act, 1896, giving a right of appeal. The notice of appeal shows on the face of it that it is in a criminal cause or matter. The expression "legal proceedings" as used in the Act of 1896 does not apply to criminal proceedings. [He

(1) [1913] A. C. 107, at p. 128. 14 Q. B. D. 648.
(2) (1883) 11 Q. B. D. 750; (1885) (3) (1875) 1 Q. B. D. 201.
(4) (1869) L. R. 4 Q. B. 573.

cited *Lumsden* v. *Inland Revenue Commissioners* (1); *Cox* v. *Hakes.* (2)]

Cur. adv. vult.

May 29. BUCKLEY L.J. read the following judgment:—In point of form the application with which we have to deal is singular, and a short statement is necessary in order to make plain how the matter comes before the Court.

On December 17, 1910, upon reading an affidavit of Edward Kennedy Howes, an order was made under the Vexatious Actions Act, 1896, in the terms of that Act prohibiting Mr. Boaler from instituting legal proceedings. The affidavit I have mentioned was one which stated that Mr. Boaler had brought, made, moved, taken out, lodged, supported or caused forty-six separate and distinct legal proceedings in connection with a company called John Esson & Son, Limited, of which short particulars were set out in a schedule to the affidavit. Nos. 2 to 7 in the schedule were informations by way of institution of criminal proceedings. On June 2, 1913, Mr. Boaler served a notice of motion in the Divisional Court asking for an order declaring that the order of December 17, 1910, did not prevent the applicant from instituting criminal proceedings. It appears that he had after December 17, 1910, and before June 2, 1913, attempted to institute criminal proceedings in two cases; in the one he attempted to prefer a bill of indictment before a grand jury at the Central Criminal Court, and in the other he applied to a magistrate to grant him a summons upon an information sworn by him. Upon that motion of June 2 the Divisional Court made no order except that Mr. Boaler was to be at liberty to serve a fresh notice of motion praying that the order of December 17, 1910, be discharged, or in the alternative that the same be limited to a prohibition in civil proceedings. Under the leave thus given Mr. Boaler on June 18, 1913, served a notice of motion for an order discharging the order of December 17, 1910, upon grounds there assigned, or (4.) in the alternative for an order limiting the order to civil proceedings, or (5.) for a declaration that upon the construction of the

(1) [1913] 3 K. B. 809, at p. 820. (2) (1890) 15 App. Cas. 506.

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Vexatious Actions Act, 1896, the High Court has no jurisdiction to make an order preventing him from preferring a bill of indictment to a grand jury. Upon that motion the order now under appeal was made. It would seem that by arrangement in the presence of the Attorney-General and of Mr. Boaler the Court heard an argument and expressed an opinion upon the construction of the Act, and without going into other grounds upon which Mr. Boaler wished to contend that the order on December 17, 1910, was wrong, declared "that criminal offences are not within the meaning of the words 'legal proceedings' mentioned in the Vexatious Actions Act, 1896." The word "offences" must here be a mistake for "proceedings." It is from this order that the Attorney-General appeals to this Court. It seems to me, and I think that was the view taken in the Court below, that the Attorney-General might have objected to any order at all being made upon Mr. Boaler's motion of June 18, but he did not do so, and by agreement the question of the construction of the Act was argued and decided by the Court. Under these circumstances I think this Court can properly review the decision of the Divisional Court upon the true construction, although technically it is difficult to say how in such a form of proceeding the jurisdiction to make or the true construction of the order of December 17, 1910, could be raised and decided.

The only question before us, and the only question I propose to consider, is the true construction of the Act of Parliament. The Act is one which contains no preamble. In the words of Lord Macnaghten in *Vacher & Sons* v. *London Society of Compositors* (1), "In the absence of a preamble there can, I think, be only two cases in which it is permissible to depart from the ordinary and natural sense of the words of an enactment. It must be shewn either that the words taken in their natural sense lead to some absurdity or that there is some other clause in the body of the Act inconsistent with, or repugnant to, the enactment in question construed in the ordinary sense of the language in which it is expressed." His Lordship had immediately before quoted the language of Tindal C.J. in the

(1) [1913] A. C. 107, at p. 118.

Sussex Peerage Case (1): "If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver." It is upon this principle that I must proceed to construe this Act of Parliament. The 2nd section of the Act gives it a short title, namely, "The Vexatious Actions Act, 1896." The marginal note to the 1st section runs: "Power of Court to prohibit the institution of action without leave." The word "action" is not elsewhere found in or about the statute. I set wholly out of consideration the fact that the word "action" is thus used. As to title the matter is governed by the title placed at the head of the Act, and that is "An Act to prevent Abuse of the Process of the High Court or other Courts by the Institution of Vexatious Legal Proceedings." That is the governing title. The fact that for the purpose of identification only and not of enactment also authority is given to identify the statute by a particular name in which the word "action" occurs is, I think, immaterial. The words "This Act may be cited as the Vexatious Actions Act, 1896," effect nothing by way of enactment. They do no more than create a name, and whether it is as matter of description accurate or not is immaterial. In support of this view I refer to that which Lord Haldane said in *Vacher & Sons* v. *London Society of Compositors* (2) as regards the title "Trade Disputes Act, 1906," and that which Lord Moulton said in the same case (3), and to that which the latter said further in *National Telephone Co.* v. *Postmaster-General.* (4) I may add that if any importance were attributed to the word "action" it is not a word from whose meaning are excluded proceedings in a criminal Court. Comyns' Digest under the title of Action says that "in life . . . . everyone . . . . has a property and right and if they are violated the law gives an action to redress the wrong," and Bacon's Abridgment says that "actions are divided into criminal and civil." With this I leave this matter.

The language of the Act is that if a person has habitually and

(1) (1844) 11 Cl. & F. 85, at p. 143.
(2) [1913] A. C. at p. 114.
(3) [1913] A. C. at p. 128.
(4) [1913] A. C. 546, at p. 560.

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persistently instituted vexatious legal proceedings, &c., the Court may order that no legal proceedings shall be instituted by that person. The words "legal proceedings" are, I think, applicable to and include as well criminal as civil proceedings in a Court. In the argument in the Court below the Solicitor-General referred to several Acts of Parliament in which the word "proceedings" is used to indicate criminal proceedings. I may add as relevant to the particular criminal proceedings which Mr. Boaler desired to take that s. 65 of the Companies Act, 1862, was headed with the words "Legal Proceedings," and that s. 276 of the Companies (Consolidation) Act, 1908, is headed "Legal Proceedings, Offences, &c.," and in both cases the sections which follow deal with (inter alia) criminal proceedings. In *In re Briton Medical Association* (1) it was held that criminal proceedings were capable of being restrained under s. 85 of the Companies Act of 1862. Sect. 100 of the Judicature Act in defining an action speaks of a "civil proceeding" and of a "criminal proceeding." This is enough, I think, to show that the words "legal proceedings" are words sufficient in themselves to include criminal proceedings. The words "legal proceedings" are no doubt general words, but generality is to my mind not ambiguity. The verb used in the Act is "institute." That is a word which is applicable to criminal proceedings. For instance, in s. 9 of the Costs in Criminal Cases Act, 1908, occur the words "a person at whose instance the prosecution has been instituted." The expression "to institute a prosecution" is, I think, an accurate one. Colloquially "to start or to launch a prosecution" might be used, but I should not expect to find those expressions in an Act of Parliament. The only other verbs which occur to me are "institute" or "initiate" or "begin." So far, therefore, the words of the Act seem to me to be sufficient to include criminal proceedings. Next, the proceedings which may be restrained are spoken of as proceedings in "the High Court or any other Court." By s. 16, sub-s. 11, of the Judicature Act, 1873, there is vested in the High Court jurisdiction in criminal matters, and s. 29 speaks of "criminal jurisdiction capable of being exercised by the said High Court." Again, therefore, the

(1) (1886) 32 Ch. D. 503.

words of the Act of Parliament are sufficient to include criminal proceedings in the High Court or any other Court even if the later words ought to be confined to other Courts having jurisdiction similar to that of the High Court.

The words "legal proceedings" are twice used in the Act of 1896. According to ordinary principles of construction they ought to receive the same interpretation in each case in which they are used. Ought the words when first used to be taken to mean legal proceedings other than criminal proceedings? Let me suppose a case in which a person has habitually and persistently instituted vexatious criminal proceedings, has repeatedly alleged fictitious criminal acts, and has habitually and persistently, whether against the same person or against different persons, instituted unfounded criminal proceedings, is there any reason in the language of the Act to doubt that it is intended to give power to order that no further criminal proceedings shall be instituted by him in the High Court or any other Court? If that habitual and persistent institution of proceedings is proved, why am I to suppose that the plain words of the Act do not intend that a stop shall be put to it? If then the words when first used include criminal proceedings the same words when next used must also include them, and the Act empowers the prohibition of criminal proceedings. If the case were one in which the persistent proceedings were civil proceedings only, it may be that the Act might reasonably have provided that a veto might be imposed upon like proceedings only to the exclusion of criminal proceedings, and inasmuch as the words of the Act are that "no legal proceedings shall be instituted" it may be that if an order is made it must extend to both. This, I think, is not matter for me to consider in determining what is the plain meaning of the words. I find in them a provision depriving a subject under extraordinary circumstances of those which would but for this Act of Parliament be his rights as a free citizen, and I have no right to say that the Legislature ought to have imposed a smaller right of veto than it has imposed. I have only to ascertain the ordinary and natural sense of the words. Construing the Act upon those principles it seems to me that the Act extends to criminal proceedings, and I so hold.

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Considerations have been urged before us based upon questions of public policy and the like. I do not think that these are admissible when the question is only as to the meaning of the words of the Act, but I will say a word upon them as they have been raised. It seems to me that this is an Act giving extraordinary powers under extraordinary circumstances. On the one side it is no doubt a grave matter that a subject should be debarred from remedy if a criminal offence be committed against him. On the other hand it is a grave matter if a person has so conducted himself as to expose himself to an order under the extraordinary powers of this Act that he should be allowed to continue his litigious insistence undisturbed. As between those two matters the Legislature, I conceive, was convinced that the latter was the more grave. The subject is not deprived of redress, but being a person such as he is proved to be he is not allowed to seek redress until he has satisfied the proper authority that the legal proceedings he desires to take are not an abuse. I cannot think that the Act intended that, if (say) a person has persistently made false accusations of criminal offences and instituted prosecutions, it should not be possible to make an order under the Act against him. It is said that under such circumstances a magistrate might refuse a summons irrespective of this Act. This seems to me to overlook two facts, first, that the magistrate might well not have knowledge of, or if he had knowledge might have great difficulty in giving effect to, the known character of the intending prosecutor, and, secondly, that if the magistrate having such knowledge did on that ground refuse a summons he would be shutting the doors of a criminal Court against the intending prosecutor without giving him the benefit of the extraordinary precautions of the present Act which allow an order to be made only if the Attorney-General upon his responsibility takes it upon himself to apply to the Court for an order. At the date of this Act the Vexatious Indictments Act of 1859 had long been in operation and had been from time to time extended to other offences. It differs from the present Act in two respects, first, that it applies to every subject and not to the particular class of person governed by the Act of 1896, and, secondly, that it applies only to certain offences. The Act of

1896 seems to me to cover a larger field in one respect and a smaller field in another. No inference, I think, is to be drawn from the fact that the Act of 1859 already dealt with criminal proceedings to a certain extent.

The construction which I place upon the Act of 1896 is that it extends to criminal proceedings. I think that the order under appeal ought to be discharged, and that there should be substituted a declaration that criminal proceedings are within the meaning of the words "legal proceedings" in the Act of 1896.

KENNEDY L.J. read the following judgment:—The result of this appeal depends wholly upon the interpretation of the expression "legal proceedings" in s. 1 of the Vexatious Actions Act, 1896 (59 & 60 Vict. c. 51). Do these words or do they not include criminal as well as civil proceedings? The Divisional Court by a majority (Darling and Lush JJ., Bankes J. dissenting) has decided that they do not, and we, in the Court of Appeal, are invited by the appellant to hold that this decision was wrong.

There is no sort of doubt, in regard to the proper principle of interpreting a statutory enactment, that a judicial tribunal which is called upon to interpret is bound as a general rule, if the effect of the words of the enactment, read in their ordinary and natural sense, is clear and unambiguous, to give to those words that effect and no other. The Legislature must be intended to mean what it has plainly expressed. "It matters not in such a case what the consequences may be. Where, by the use of clear and unequivocal language, capable of only one meaning, anything is enacted by the Legislature, it must be enforced even though it be absurd and mischievous. If the words go beyond what was probably the intention effect must, nevertheless, be given to them": Maxwell on the Interpretation of Statutes, 5th ed., p. 5; and see per Lord Esher M.R. in *Reg.* v. *City of London Court.* (1) Lord Macnaghten in *Vacher & Sons* v. *London Society of Compositors* (2) and Lord Haldane L.C. in *Inland Revenue Commissioners* v. *Herbert* (3) have recently stated the law in almost equally stringent terms.

(1) [1892] 1 Q. B. 273, at p. 290. (2) [1913] A. C. at p. 118.
(3) [1913] A. C. 326, at p. 332.

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The present case is not that case. It is, in my view, impossible to say that the meaning of the expression "legal proceedings" is in itself and by itself clear and unambiguous. The words, taken by themselves, have a sufficient and a natural meaning if they are read as referring either to civil proceedings or to criminal proceedings; or they may be inclusive and signify both civil and criminal proceedings.

In the present contest no one contends that the words "legal proceedings" are to be read as applying only to criminal proceedings: the question is whether they ought to be read as including any but civil proceedings. It by no means follows, because the words are wide enough to do so, that they ought so to be interpreted. Speaking of general words in a statute Mr. Maxwell at p. 97 observes: "However wide in the abstract, they are more or less elastic and admit of restriction or expansion to suit the subject-matter . . . . It is, therefore, a canon of interpretation that all words, if they be general and not express and precise, are to be restricted to the fitness of the matter." So "persons" may or may not include corporations; "inhabitants" may or may not include all actual dwellers in the locality. In *Cox* v. *Hakes* (1) Lord Halsbury L.C. at p. 515 to 517 deals with, and justifies by quotation, the right to give in the interpretation of general words in a statute a narrower or limited meaning if the intention of the Legislature appears to require it. I shall not quote the whole of the passage, but I will quote one sentence only. The question there was as to the interpretation in regard to the right of appeal from an order of the Queen's Bench Division for discharging a person under a habeas corpus. The Judicature Act, 1873, s. 19, gives the Court of Appeal power to hear appeals in all matters not criminal. The Lord Chancellor, in reference to this s. 19, said: "My Lords, I do not deny that the words of s. 19 literally construed are sufficient to comprehend the case of an order of discharge made upon an application for discharge upon a writ of habeas corpus; but it is impossible to contend that the mere fact of a general word being used in a statute precludes all inquiry into the object of the statute or the mischief which it was intended to remedy." In the present case

(1) 15 App. Cas. 506.

this Court has to consider the true meaning in this statute of the general words "legal proceedings." We are therefore at liberty, and indeed in the performance of our judicial duty are bound, in ascertaining that which we have to try to ascertain, namely, the intention of the Legislature, to consider, in choosing between the possible interpretations, the context itself, the accord or the want of accord of one or other interpretation with well-recognized principles in regard to the interpretation of statutes, and, further, if other things are equal, the comparative reasonableness of the legislation as it is interpreted in one way or in the other. This last consideration, which I hold must be very cautiously applied, is put by Lord Esher (1) in its strongest form in the following words: "If the words of an Act admit of two interpretations then they are not clear; and if one interpretation leads to an absurdity and the other does not, the Court will conclude that the Legislature did not intend to lead to an absurdity, and will adopt the other interpretation."

I proceed first to consider the context. The title speaks of "the institution of vexatious legal proceedings"; s. 1 speaks of a person having habitually and persistently "instituted vexatious legal proceedings" and "no legal proceedings shall be instituted." Now I have no doubt that the word "institute" may be found in use in statutes, legal text-books, and legal parlance, in reference to criminal as well as to civil proceedings. But when it is used n reference to criminal proceedings what does it denote? It denotes the commencement of the proceedings. How, in criminal proceedings, does that commencement take place? It is stated in Archbold's Criminal Pleading Evidence and Practice (24th ed.) at p. 92: "The commencement of the prosecution is the preferring of the indictment when it is sent up without a preliminary inquiry; or the laying of the information; or, it would seem, the arrest of the accused, or the application for summons or warrant in respect of the offence." Is it reasonable to suppose that the Legislature, when by this Act it gave the High Court power by order to prevent a person who had habitually and persistently instituted civil proceedings in the High Court or any inferior Court without any reasonable ground from instituting legal proceedings in the High

(1) *Reg.* v. *City of London Court* [1892] 1 Q. B. at p. 290.

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Court or any other Court, intended that such a vexatious litigant, man or woman, should not if robbed or assaulted be entitled to give the criminal wrong-doer in charge, or to apply to a magistrate for a summons, without first going to a judge in chambers in London, or to a Divisional Court, and satisfying the judge or the Court that his proceeding is not an abuse of the process of the Court? But for the divergence of opinion in the present case, both in the Divisional Court and in this Court, I should have humbly ventured to think that the refusal of the institution of proceedings to obtain redress for a criminal wrong, however vexatiously litigious the applicant for that redress may have been, unless he first instituted an inquiry into the merits of his claim by civil proceedings in the High Court in London to get leave to institute the criminal proceedings—and this follows from the contentions of the learned Solicitor-General—was in itself sufficient to show that the construction which the appellant seeks to put upon "legal proceedings" in this statute was untenable. And in this connection it is not an unimportant consideration that in the case of indictable offences our law in the preliminary stage before the magistrate, or, if the matter goes before the grand jury, in their inquiry, has already given ample safeguards against the further prosecution of anything like a frivolous charge.

Passing from the use of the words "institute" and "institution" in the context, I think that on a well-known principle of construction the narrower meaning of the words "legal proceedings" is entitled to preference. The enactment is one which even in regard to civil proceedings seriously abridges the right of the subject to such redress in the Courts of law. I do not presume for one moment to question the wisdom of the abridgment. But if it includes an abridgment of the rights of the subject in regard to redress for crimes committed in regard to his person or his property, one would, I venture to think, justly expect the Legislature, instead of using words of general import, to make it quite clear that criminal proceedings were intended to be included in the enactment. "Statutes which encroach on the rights of the subject whether as regards person or property, are similarly" (the learned author has in the preceding chapter been

dealing with the construction of Penal Acts) "subject to a strict construction. . . . . It is a recognised rule that they should be interpreted, if possible, so as to respect such rights." (Maxwell on the Interpretation of Statutes, 5th ed. p. 461.)

For these reasons I am of opinion that the judgment of the Divisional Court was right and ought to be affirmed. I lay no stress upon the language of s. 2, sub-s. 2: "This Act may be cited as the Vexatious Actions Act, 1896." In the first place, although the use of the word "actions" except in reference to civil proceedings is now obsolete, it is just possible that the parliamentary draftsman may have had in his mind the fact that in a passage in Bacon's Abridgment which was cited to us by counsel is to be found the statement that "actions are divided into criminal and civil." In the second place, in two recent cases in the House of Lords there have been expressions of opinion on the part of the Lord Chancellor and Lord Moulton against the use of its short title as an aid to the interpretation of a statute. Nor do I attach any value to the marginal note, "Power of Court to prohibit institution of action without leave." The marginal note forms no part of the statute. I have come to my conclusion by giving to the statute that which, in my humble judgment, is not only a natural interpretation of the words which I find in it, but one which, if due regard is paid to its subject-matter and its working, is most in accord with recognized principles of interpretation.

I now proceed to read the judgment of my brother Scrutton.

SCRUTTON J. In the case of Bernard Boaler on December 17, 1910, an order was made under an Act, the statutory short title of which is "The Vexatious Actions Act, 1896," that no legal proceedings should be instituted by Bernard Boaler in the High Court, or any other Court, unless he obtained the leave of the High Court or some judge thereof, and satisfied the Court or judge that such legal proceeding was not an abuse of the process of the Court, and that there was a prima facie ground for such proceeding. Mr. Boaler was much interested in the due observance of the company laws by others. He desired, after the order I have set out, to present a bill of indictment for an offence

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against those laws to the grand jury at the Old Bailey, and was refused by direction of the Recorder as he had not obtained the leave of a judge of the High Court. He also desired on a sworn information to apply for a summons to a magistrate, and was refused on the same ground. A Divisional Court allowed him to move to set aside or vary the order made under the Act of 1896 on the ground that it did not prevent his endeavouring to initiate criminal proceedings, but only his institution of civil proceedings. On the case coming before the Divisional Court the majority, Darling J. and Lush J., held that the Act and order were limited in their prohibition to civil proceedings; Bankes J. dissented, holding that the Act and order applied both to civil and criminal proceedings. The Attorney-General appeals from this decision, and the Court has now to decide the true construction of the Act, quite apart from the question whether it has any sympathy with Mr. Boaler and his peculiar manifestations of detective energy.

One of the valuable rights of every subject of the King is to appeal to the King in his Courts if he alleges that a civil wrong has been done to him, or if he alleges that a wrong punishable criminally has been done to him, or has been committed by another subject of the King. This right is sometimes abused and it is, of course, quite competent to Parliament to deprive any subject of the King of it either absolutely or in part. But the language of any such statute should be jealously watched by the Courts, and should not be extended beyond its least onerous meaning unless clear words are used to justify such extension. It cannot be denied that on the meaning put on this statute by the Solicitor-General Mr. Boaler may be robbed or assaulted in a distant county, or a lady litigant, who frequently brings vexatious actions and is restrained under the Act, may suffer the gravest wrong a woman can suffer; an unsympathetic policeman may say "It's only Boaler, or Mrs. So-and-so," and decline to take action, and the restrained litigant may be unable to obtain a warrant, or get any redress, until he or she has satisfied a judge in London, either by affidavit or personal evidence, that a wrong has been done to him or her.

I approach the consideration of a statute which is said to have

this meaning with the feeling that unless its language clearly convinces me that this was the intention of the Legislature I shall be slow to give effect to what is a most serious interference with the liberties of the subject. Omitting for the moment the title, or short title, the material enacting words are that if the Attorney-General satisfies the Court that any person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground for instituting such proceedings, whether in the High Court or in any inferior Court, the Court may order that no legal proceedings shall be instituted by that person in the High Court or any other Court, unless he obtains the leave of the High Court or some judge thereof. The words "legal proceedings" are, in my opinion, wide enough to cover criminal as well as civil process; "instituting legal proceedings," however, seems to me a phrase much more appropriate to civil than to criminal process. A subject of the King by issuing a writ against a person within the jurisdiction institutes a proceeding which must proceed. He can serve the writ and obtain judgment by default, or compel the defendant to take part in the proceedings. A person presenting a bill of indictment to a grand jury, or applying for a summons to a magistrate, sets on foot of his own motion no proceedings which injure the accused. Nothing will happen unless the grand jury find a true bill, or the magistrate gives leave to issue the summons; and when the grand jury or the magistrate has allowed the proceedings to affect the accused, the proceeding is not the private prosecutor's. His name never, as far as I can trace, appears on the record: the title is "The King" *v.* the accused. The King can control the whole proceedings; he can deprive the private prosecutor of any voice in them by taking over the prosecution; he can stop the proceedings by entering a nolle prosequi. If the accused formally pleads, the replication where there is a private prosecutor runs: "The King's Coroner, or Clerk of Arraigns, or Clerk of Assize," as the case may be, "before the King himself who for our Lord the King in this behalf prosecutes as to the plea of the said A.B. puts himself upon the country." The private prosecutor can do nothing to harm the accused unless a public body or officer allows the proceedings to go on, and they go on not as the

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private prosecutor's proceedings, but as the King's proceedings. Under those circumstances the language "institutes proceedings" appears to me far more appropriate to civil than to criminal proceedings. Further, I find in the Act nothing about appeals, as I should expect to do if it related to criminal proceedings. An order restraining the vexatious litigant from taking civil proceedings, or allowing him to bring one civil proceeding, may be appealed to the House of Lords. An order restraining him from taking criminal proceedings, or allowing, or refusing to allow him to initiate one criminal proceeding, would, I think, be an order in a criminal matter which by the Judicature Act is not subject to an appeal, and if so an order refusing to allow a man or woman to endeavour to initiate proceedings in the criminal Courts in respect of a wrong alleged to be done to himself or herself would be made by a judge in the unreportable privacy of chambers without appeal. Parliament may enact this, as they may enact anything else, but I should expect words showing a clear intention so seriously to interfere with the liberties of the subject. The Court has then general words which in one respect, "legal proceedings," cover both civil and criminal proceedings; in another respect "institute" is far more applicable to civil than criminal proceedings. For what reasons may the Court restrict these general words? The object of the Courts is, from the words used, construed in reference to the subject-matter in which they are used, to get at the intention of the Legislature and give effect to it. When the Legislature has used general words capable of a larger and a narrower meaning, those words may be restricted by innumerable presumptions all designed to give effect to the reasonable intent of the Legislature. A presumption against any alteration of the law beyond the specific object of the Act; a presumption against intending an excess of jurisdiction, or a violation of international law; a presumption against intending what is inconvenient or unreasonable, against intending injustice or absurdity; a strict construction of penal laws, or statutes encroaching on rights, especially the liberties of the subject, or imposing burdens; all are cases where general words have been cut down to a narrower meaning in endeavouring to seek the intention of the Legislature, not from

the widest meaning of the words used, but from the considerations that must have influenced Parliament in framing the enactment. For instance, the Judicature Acts provide that the Court of Appeal shall have jurisdiction to determine appeals from any judgment of the High Court of Justice, except certain specified exceptions, which do not include appeals from orders discharging persons from custody under a writ of habeas corpus, yet the House of Lords in *Cox* v. *Hakes* (1) cut down these wide general words and refused an appeal from such an order on the ground, amongst others, of the great change that would be made in the liberties of the subject by giving the words their literal meaning, and the consequences that would follow such a change in the law. When there were two possible constructions of general words, one of which took away the respondent's property without compensation, Lord Davey said in *Commissioners of Public Works* v. *Logan* (2): "Such an intention should not be imputed to the Legislature unless it be expressed in unequivocal terms. This principle has frequently been recognized by the Courts of this country as a canon of construction." I think one of the principles of limitation is correctly stated in Maxwell on the Interpretation of Statutes, 5th ed. at p. 461: "It is presumed where the objects of the Act do not obviously imply such an intention that the Legislature does not desire to confiscate the property, or to encroach upon the rights of persons; and it is therefore expected that if such be its intention it will manifest it plainly, if not in express words, at least by clear implication, and beyond reasonable doubt." In the case of this statute the Legislature clearly intends to interfere with some rights of persons, and uses words capable of extension to rights of litigation in criminal matters, but in my opinion more suitable to the subject-matter of rights of litigation in civil matters only. In my view, looking at the enacting part of the statute only, the presumption against interference with the vital rights and liberties of the subject entitles, even compels, me to limit the words to that meaning which effects the least interference with those rights. Two other matters have also influenced me in coming to this conclusion. I am influenced by consideration of the difficulty and evil which were in existence at the time this Act

(1) 15 App. Cas. 506. (2) [1903] A. C. 355, at p. 363.

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was passed, and which I have no doubt it was intended to remedy. The first order made under the Act of 1896 was made in January, 1897—see *In re Chaffers* (1)—against one Chaffers who had brought, before the passing of the Act, forty-seven civil actions against the Speaker, the Archbishop of Canterbury, the Lord Chancellor, and numerous other high functionaries, without success, and without payment of costs. He had not extended his mischievous activity to criminal proceedings. I have no doubt that this was the grievance that Parliament was remedying. Secondly, s. 2 of the Act contains a sub-section: "This Act may be cited as the Vexatious Actions Act, 1896." This has certainly in my mind supported the conclusion to which I have come. I am aware that two members of the House of Lords have as dicta said that no attention should be paid to the short title; there are similar dicta with regard to the full title, but I think the law is correctly stated by Lord Macnaghten in *Fenton* v. *Thorley & Co.* (2): "It has been held that you cannot resort to the title of an Act for the purpose of construing its provisions. Still, as was said by a very sound and careful judge, 'the title of an Act of Parliament is no part of the law, but it may tend to shew the object of the Legislature.' Those were the words of Wightman J. in *Johnson* v. *Upham* (3), and Chitty J. observed in *East and West India Docks* v. *Shaw, Savill and Albion Co.* (4) that the title of an Act may be referred to for the purpose of ascertaining generally the scope of the Act. Surely, if such a reference is ever permitted, it must be permissible in a case like this." Maxwell on the Interpretation of Statutes, 5th ed. p. 67, summarizes the authorities thus: "It is now settled law that the title of a statute . . . . may be referred to for the purpose of ascertaining its general scope." I agree that the Court should give less importance to the title than to the enacting part, and less to the short title than to the full title, for the short title being a label, accuracy may be sacrificed to brevity; but I do not understand on what principle of construction I am not to look at the words of the Act itself, to help me to understand its scope in order to interpret the words Parliament has used by the circumstances

(1) (1897) 76 L. T. 351.
(2) [1903] A. C. at p. 447.
(3) (1859) 2 E. & E. 250, at p. 263.
(4) (1888) 39 Ch. D. at p. 531.

in respect of which they were legislating. It is by no means conclusive, but it is striking that if they were intending to deal with criminal proceedings they should call their Act the Vexatious Actions Act. I respectfully decline to believe that they did so because they were aware that Bacon's Abridgment speaks of criminal actions, and I am fairly confident that for the last century the term has never been used of criminal proceedings until counsel suggested such a use in this case. The anonymous author of the marginal note thought the correct summary of s. 1 was "Power of Court to prohibit institution of action without leave," but this is not part of the statute, and I pay no attention to it in forming my opinion. I refer also in support of the conclusion to which I have come to the judgment of Lush J., with which in general I concur. But the broad general ground on which I have formed my opinion is this: I find general words used in the Act capable of two meanings, a wider and a narrower one. On the whole I think the language is more suited to the narrower than the wider meaning. The narrower meaning will affect the liberties of the subject to some extent; the wider meaning will most seriously affect the liberties of the subject in a matter, his personal liberty and safety, which I see no reason in the Act to believe was in the contemplation of the Legislature. I decline to make this more serious interference with the liberty of the subject, unless the Legislature uses language clear enough to convince me that that was its intention, and I think ample meaning is provided for its words, and ample remedy is provided for the grievance in respect of which Parliament was legislating by putting the narrower construction on the general words it has used.

In my opinion the appeal fails and should be dismissed with costs.

Appeal dismissed.

Solicitor for appellant: *Solicitor to the Treasury.*

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[IN THE COURT OF APPEAL.]

ROBERTS & CO. *v.* MARSH.

Bill of Exchange—Cheque—Unconditional Order for Payment of Money—"To be retained" written by Drawer on Face of Cheque—Bills of Exchange Act, 1882 (45 *&* 46 *Vict. c.* 61), *ss.* 3, 73.

The defendant gave the plaintiffs a cheque, written on a blank sheet of paper, on the face of which he wrote "To be retained"; he promised to send a cheque on one of his bankers' printed forms in substitution for it. This he did not do, and the cheque was dishonoured on presentment. In an action on the cheque:—

Held, that the addition of the words "to be retained" merely imported a condition between drawer and drawee, and did not prevent the instrument being an unconditional order to pay as regards the bankers; and that it was therefore a cheque within the meaning of the Bills of Exchange Act, 1882, upon which the plaintiffs were entitled to sue.

Decision of Avory J. affirmed.

Appeal of the defendant from a decision of Avory J. at the trial without a jury. The defendant was sued on a dishonoured cheque, judgment for the amount of which was given in favour of the plaintiffs. From the evidence it appeared that the plaintiffs had entered into a contract with the defendant in connection with a scheme for the promotion of a company to purchase certain collieries and brickfields at Dudley; under the contract the defendant was to pay the plaintiffs 100*l.* At the time of signing the contract at the plaintiffs' office the defendant offered the plaintiffs a bill for the 100*l.*, but the plaintiffs insisted upon having a cheque for the amount. The defendant had not his cheque-book with him, but on a blank piece of paper supplied by the plaintiffs he wrote out a form of cheque on his bankers, which he duly signed. The defendant, not wishing a cheque in that form to pass through his banking account, wrote upon the face of it the words "To be retained," and promised the plaintiffs that he would send a cheque on one of his bankers' printed forms in substitution for it. This the defendant failed to do, whereupon the original cheque was presented by the plaintiffs, and,

being dishonoured, the present action was brought upon it. Avory J. gave judgment for the plaintiffs, and the defendant appealed.

J. B. Matthews, K.C., for the defendant. The document was not an unconditional order in writing for payment of a sum certain in money within the definition of a bill of exchange in s. 3 of the Bills of Exchange Act, 1882; neither, therefore, was it a cheque within the definition of that term in s. 73 of the Act. The words "to be retained" written on its face prevented its being an unconditional order to pay; they evidenced the right of the plaintiffs to demand a proper cheque in due course. They were equivalent to saying that the cheque was not to be presented, and it could not be presented to the defendant's bankers with any prospect of payment.

[*Herbert Jacobs*, for the plaintiffs, referred to *Nathan* v. *Ogdens*. (1)]

That case has no application to the present one. Parol evidence was not admissible to explain the meaning of the words.

Herbert Jacobs, for the plaintiffs, was not called upon.

BUCKLEY L.J. I am of opinion that this appeal fails. [After stating the facts, his Lordship proceeded:] It is contended by Mr. Matthews that this is not an unconditional order to pay, and that therefore the plaintiffs cannot sue upon it. I do not think that is so. The words "to be retained" are not words which bind the bankers. They import a condition between drawer and drawee, but the order to pay addressed to the bankers is unconditional. We have been referred to *Nathan* v. *Ogdens*. (1) In that case the facts were that the cheque was drawn for the distributive share of a customer in a certain fund, and was sent with a covering letter which described it as being "your share of the second and final bonus distribution of Ogdens, Limited, for the quarter ending September 30 last, at which date the company ceased to carry on business." At the foot of the cheque were printed the words "The receipt at the

(1) (1905) 93 L. T. 553; 94 L. T. 126.

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back hereof must be signed, which signature will be taken as an indorsement of the cheque," and on the back was printed "Received from . . . . the liquidator of Ogdens, Limited, this cheque for £ , being my share of the second and final bonus distribution of the company." The condition there imposed was that the receipt was to be signed, inferring that there would be no payment of the cheque unless the receipt was signed. It was held that the condition was a condition only as between drawer and drawee, not addressed to the bankers, and not binding on them, and that the order, as regards them, was an unconditional order to pay. In my opinion that decision is applicable to the facts of the present case and is decisive of it. As regards the merits, there is no defence.

KENNEDY L.J. I am of the same opinion. The single point raised is that this document is not effectively a cheque. A cheque is a bill of exchange drawn on bankers payable on demand, and must be an order to pay which is in itself unconditional, an order on the bankers on whom it is drawn. Here the document contained the words "To be retained" written in the same line as the amount and stamp. If presented to the bankers they could not have said that it was only a conditional order to pay, and therefore they would not pay it; the words written in are only a request to the payee. The instrument is an order on the bankers to pay on demand, and the decision of Avory J. was quite right.

PHILLIMORE L.J. I agree. The defendant having set up, in proceedings under Order XIV., that the cheque had been given on a condition which had not been fulfilled, the plaintiffs gave evidence which successfully displaced that defence. A banker requires a cheque which is an unconditional order to pay; but the presence on the cheque of some agreement between drawer and drawee does not prevent its being an unconditional cheque. In *Nathan* v. *Ogdens* (1) there was an ingenious attempt by the liquidator of Ogdens, Limited, to bind the customers to take a final cheque by incorporating with it a form of receipt;

(1) 93 L. T. 553; 94 L. T. 126.

it was held to be an unconditional order to pay and a good cheque. For the same reasons that prevailed in that case, I am of opinion that this is also an unconditional order to pay and a good cheque.

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Appeal dismissed.

Solicitors for plaintiffs: *Griffenhoofe & Brewster.*

Solicitors for defendant: *Timbrell & Deighton, for Hooper & Fairbairn, Dudley.*

W. J. B.

ROPER AND ANOTHER *v.* THE COMMISSIONERS OF HIS MAJESTY'S WORKS AND PUBLIC BUILDINGS.

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[1913 R. 1177.]

Crown—Prerogative—Servants of the Crown—Incorporation—Liability to be sued—Agreement of Tenancy—Premises used as Labour Exchange—Breach of Contract—Nuisance—The Commissioners of Works and Public Buildings.

The rule that servants of the Crown are not liable to be sued in their official capacity for torts committed by them is unaffected by the fact that they are incorporated.

Therefore where servants of the Crown, being a corporation, became tenants of demised premises, and the landlord brought an action against them in their official capacity for breach of the agreement of tenancy and for trespass and nuisance; the points of law raised on the pleadings having been set down for hearing:—

Held, that as to the claims for trespass and nuisance the action must be stayed, notwithstanding that as to the claim for breach of agreement it was, on the authority of *Graham* v. *Public Works Commissioners* [1901] 2 K. B. 781, allowed to proceed.

POINT OF LAW arising on the pleadings.

The plaintiffs claimed—

(*a*) damages for breach of an agreement in writing made July 16, 1912, between the plaintiffs and the defendants whereby the plaintiffs agreed to let and the defendants agreed to take the premises therein mentioned from March 25, 1912, for the period of two years and three quarters on the terms and conditions therein contained;

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(*b*) an injunction to restrain the defendants, their agents or servants, from carrying on or permitting on the said premises or any part thereof any noisy, noisome, or offensive or dangerous trade, business, or occupation or permitting or suffering any nuisance to arise or continue therein, or cutting, injuring, or removing or allowing to be cut, injured, or removed any of the landlord's fittings or fixtures therein, or assigning, underletting or parting with the possession of the said premises or any part thereof without the previous licence of the plaintiffs;

(*c*) possession of the said premises;

(*d*) further and other relief.

The statement of claim contained the following paragraphs:—

"1. By an agreement in writing dated July 16, 1912, and made between the plaintiffs of the one part and the defendants of the other part the plaintiffs agreed to let and the defendants agreed to take all those rooms or offices formerly the ground and first floor of the building known as No. 371 City Road in the metropolitan borough of Islington in the county of London together with the use in common with other tenants of the w.c.'s in the basement area from March 25, 1912, for the period of two years and three quarters thereafter on a yearly tenancy at the yearly rent of 220*l.* payable by equal quarterly instalments in each year. By the said agreement the plaintiffs reserved the free and uninterrupted use in common with the other tenants of the entrance corridor and staircase and of all pipes and drains in through or under the said premises.

"2. It was an express or alternatively an implied condition of the said agreement and the defendants thereby agreed that they—

"(A) would keep the inside of the said premises and deliver up the same with vacant possession at the expiration of the term and the landlord's fixtures and fittings therein in good tenantable repair order and condition and properly cleansed and would replace with new all broken and cracked glass damaged or missing fixtures fittings and keys;

"(B) would not carry on or permit on the said premises or any part thereof any noisy noisome offensive or dangerous trade business or occupation not (nor?) permit or suffer any nuisance to arise or continue therein;

"(C) would not cut maim or injure any of the walls or floors partitions or main timbers or make any openings in or alter the construction of the said premises or any of the landlord's fixtures or fittings therein;

"(D) would not assign or underlet or part with the possession of the premises or any part thereof for all or any part of the term.

"In so far as the said conditions are implied they are implied from the language of the said agreement.

"3. The defendants duly entered on the said premises under the said agreement and have used and continued to use the same as a labour exchange and in connection with the working of the National Insurance Act, 1911.

"4. By the said agreement it was provided that if and whenever the defendants should not in all respects duly observe and perform all the agreements and conditions on their part therein contained it should be lawful for the plaintiffs to re-enter upon the said premises.

"5. In breach of the said conditions and of their said agreement and of their duty to the plaintiffs the defendants have not kept the inside of the said premises or the landlord's fittings or fixtures in good or tenantable repair or order or condition or properly cleansed and have not replaced with new all broken or cracked glass or damaged or missing fixtures or fittings or keys and have carried on and permitted on the said premises noisy noisome offensive and dangerous trades businesses and occupations and permitted nuisances to arise and continue therein and have cut and maimed and injured the walls floors partitions and main timbers and the landlord's fittings and fixtures and made openings in and altered the construction of the same and have assigned and underlet and parted with the possession of the said premises or part thereof.

"Particulars.

"The defendants in using the premises as aforesaid have not provided any or any adequate supervision but have permitted and continue to permit large numbers of loafers and persons coming thereto to hang about the premises and to remain in the corridor and staircase and to obstruct the other tenants' access to the premises and to use the w.c.'s and other conveniences in

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the basement and render them unfit for use by the other tenants and to commit nuisances on the premises and to make a great noise and use filthy and abusive language.

"The defendants have underlet or otherwise parted with the possession of the first floor of the said premises to two trade unions (believed to be the Wheelwrights' Union and the French Polishers' Union) which have held and continue to hold meetings thereon attended by fifty to sixty persons and lasting up to 11 o'clock at night and making much noise. The said unions use the said premises under agreements in writing or alternatively verbal agreements granted to them by the Board of Trade whereby the Wheelwrights' Union are granted the right to use the premises or part thereof on every Monday during the winter and on every third Monday in the month during the summer and the French Polishers' Union have a similar right for every Friday. The defendants have by the said agreements or in some other manner not known to the plaintiffs permitted and authorized the members of the said unions to use the w.c.'s and conveniences in the basement and the same have been and continue to be used by such members.

"Owing to the matters aforesaid the letter boxes of the other tenants have been pilfered all the waste pipes that were observable on the building and the supply pipes and closet wastes have been ripped away and attempts made to remove the fittings adjoining houses have been broken into and robberies committed and all the glass doors and side panels in the basement have been broken by persons permitted or authorized by the defendants to come on the premises as aforesaid."

"7. Further by reason of the matters aforesaid the defendants have permitted a nuisance on the said premises and further and in the alternative by persons authorized or permitted as aforesaid have trespassed on the portions of the premises not demised to them. The plaintiffs repeat the particulars hereinbefore set out under paragraph 5."

"9. By reason of the matters hereinbefore alleged the plaintiffs have suffered damage and have lost tenants who have refused to continue on the premises and the said premises have been depreciated in value."

After giving particulars of special damage and after alleging that the defendants threatened and intended to repeat and continue the acts complained of unless restrained by injunction, the plaintiffs claimed

"(A) Possession of the said premises.

"(B) Under paragraphs 5 and 7 damages.

"(C) Mesne profits.

"(D) Alternatively an injunction restraining the defendants their agents or servants from carrying on or permitting on the said premises or any part thereof any noisy noisome or offensive or dangerous trade or business or occupation or permitting or suffering any nuisance to arise or continue therein or cutting injuring or removing or allowing to be cut injured or removed any of the landlord's fittings or fixtures therein or assigning underletting or parting with the possession of the said premises or any part thereof without the previous licence in writing of the plaintiffs.

"(E) Further or other relief."

The amended defence contained the following paragraphs:—

"1A. The defendants are a department of the Government and are servants and agents of the Crown and as the Commissioners of His Majesty's Works and Public Buildings they possess no other capacity and they entered into the said agreement in their said capacity as servants and agents of the Crown and not otherwise and they submit that they are not liable to be sued in respect of alleged breaches of the said agreement and that the plaintiffs' remedy (if any) in respect of such alleged breaches is by petition of right to His Majesty. Further the defendants submit that they are not liable in their capacity as the Commissioners of His Majesty's Works and Public Buildings or as servants or agents of the Crown or otherwise in their official capacity to be sued in respect of any of the matters complained of in this action.

"1B. The defendants will further submit that the Commissioners of His Majesty's Works and Public Buildings are not liable as such to be restrained by injunction of the Court."

An order having been made in chambers that the point of law raised on these pleadings should be set down for hearing,

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Lowenthal, for the Commissioners. The history of the Commissioners and of their incorporation under 15 & 16 Vict. c. 28 and the Works and Public Buildings Act, 1874 (37 & 38 Vict. c. 84), is fully stated in the argument for the defendants in *Graham* v. *Public Works Commissioners*. (1) By s. 2 of the Act of 1874 the Commissioners as incorporated by the Act of 14 & 15 Vict. c. 42 are declared to be and it is enacted that they "shall be a corporation to all intents and purposes, and as such shall have and hold, and may exercise not only all the estates, property, interests, privileges, and powers now vested in or enjoyed by them under that Act, but also all estates, property, interests, privileges, and powers now vested in or held or enjoyed by the Commissioners of Her Majesty's Works and Public Buildings as a corporation under" the Act of 15 & 16 Vict. c. 28 "or any subsequent Act." There is no general provision enabling the Commissioners to sue or making them liable to be sued. It was held in *Graham* v. *Public Works Commissioners* (1) that an action would lie against the Commissioners for damages for breach of a contract entered into by them with a firm of builders for the erection of a public building. That case was wrongly decided. It is common knowledge that contracts made by the Commissioners are made by them as agents for the Crown. An agent who makes a contract openly and avowedly on behalf of a principal is not himself liable on the contract. It matters not that the agent is a public authority and the principal is the Crown. A petition of right may, in a proper case, lie against the Crown; but no action lies against the public authority.

Secondly, public servants of the Crown may be liable in tort as private persons, but are not liable either in contract or in tort in their official capacity. The revenue of the country cannot be reached by an action against an official unless there is some legislative provision to be found enabling this to be done: *Bainbridge* v. *Postmaster-General* (2), per Collins M.R.; *Raleigh* v. *Goschen*. (3) That is the principle upon which servants of the Crown in their official capacity are at common

(1) [1901] 2 K. B. 781. (2) [1906] 1 K. B. 178, at p. 190.
(3) [1898] 1 Ch. 73.

law immune from actions. It can make no difference that the officer may be a corporation. The mischief of subjecting the public revenue to actions for damages is just the same whether the defendant is a corporation or not: *Bainbridge* v. *Postmaster-General.* (1)

Compston, K.C., and *Bromley Eames*, for the plaintiffs. As to the liability on contract the present case is covered by *Graham* v. *Public Works Commissioners* (2), which is binding upon this Court. That case was rightly decided on the grounds stated by Phillimore J. The Commissioners are incorporated for the purpose of making contracts and of having the rights on such contracts declared. The cause of action in tort is upon the same footing. The incorporation of the Commissioners distinguishes this case from *Raleigh* v. *Goschen* (3) and *Bainbridge* v. *Postmaster-General.* (4) A corporation acts through agents and is liable for the acts of its agents within the scope of their agency. The fact of incorporation was considered an important matter in *Wheeler* v. *Commissioners of Public Works in Ireland.* (5) In *Thorn* v. *Commissioners of Public Works* (6) a decree for specific performance and an injunction as well as an account of damages for breach of contract were obtained against the predecessors of the present defendants. [*In re Wood's Estate, Ex parte Her Majesty's Commissioners of Works and Buildings* (7) and *Dixon* v. *Farrer* (8) were also cited.]

Lowenthal in reply.

SHEARMAN J. The question I have to decide is whether the Commissioners of His Majesty's Works and Public Buildings having taken premises for a labour exchange and for the purposes of the National Insurance Act, 1911, can be sued (*a*) in contract, (*b*) in tort for acts of their representatives or agents in the premises taken. The action has been brought against them (1.) for damages for breach of contract, possession of premises, and mesne profits; (2.) for damages and an injunction in respect of alleged

(1) [1906] 1 K. B. 178, at pp. 191, 192.
(2) [1901] 2 K. B. 781.
(3) [1898] 1 Ch. 73.
(4) [1906] 1 K. B. 178.
(5) [1903] 2 I. R. 202.
(6) (1863) 32 Beav. 490.
(7) (1886) 31 Ch. D. 607.
(8) (1886) 18 Q. B. D. 43.

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trespasses and nuisance. I have to decide upon consideration of the authorities whether such an action can be brought against the defendants. There is also an incidental question whether acting as a labour exchange or acting in pursuance of the National Insurance Act they are acting as servants of the Crown or merely as a statutory body invested with public rights, duties, and liabilities like the trustees of a public dock or a public park. In my view they are more than that; they are Government servants doing the work of the Government; in other words they are servants of the Crown. Now as to whether being servants of the Crown, although created a corporation to all intents and purposes by the Works and Public Buildings Act, 1874, they can be sued in contract, that question has been decided by *Graham* v. *Public Works Commissioners.* (1) I am bound by that decision. Therefore the present action must proceed as to the claims founded on breach of contract.

As to the claims for nuisance, there again I have been referred to numerous cases. I must follow the two English authorities, *Raleigh* v. *Goschen* (2) and *Bainbridge* v. *Postmaster-General.* (3) The former case lays down that persons directly responsible as doing or personally authorizing a trespass are liable in their own private capacity notwithstanding that they may be servants of the Crown. That case was followed in *Bainbridge* v. *Postmaster-General* (3), which decided that the head of a Government department is not liable in his official capacity, the reason being that an individual cannot by means of an action reach the public funds. The defendant in that case was the head of the Post Office, which is not a corporation to all intents and purposes as the defendants in the present case are. I was pressed by Mr. Compston to hold that this feature distinguishes this case from *Bainbridge* v. *Postmaster-General* (3) in this respect, that as a corporation can only act through agents it must be taken to have authorized the acts of its agents, but in the case cited I find that Collins M.R., after carefully considering the authorities, came to the conclusion that the presence or absence of incorporation made no difference to the proposition that the heads of Government departments

(1) [1901] 2 K. B. 781. (2) [1898] 1 Ch. 73.
(3) [1906] 1 K. B. 178.

are not responsible for the acts of subordinates. I was referred to dicta in *Wheeler* v. *Commissioners of Public Works in Ireland*. (1) It was there decided that for the purposes in question the Commissioners were not acting as Crown servants, which is enough to dispose of that case as an authority in the present case. The whole current of authority tends to the conclusion that servants of the Crown are not liable to be sued in their official capacity for torts. As to the claims for nuisance and trespass therefore the action will be stayed.

Order accordingly.

Solicitors for plaintiffs: *Gedge, Fiske & Gedge.*
Solicitor for Commissioners: *The Treasury Solicitor.*

NOTE.—The Commissioners gave notice of appeal and there was a cross-notice by the plaintiffs. The case was in the list for hearing in the Court of Appeal on July 27, 1914, but was settled before argument, and no decision was given upon the points raised.

(1) [1903] 2 I. R. 202.

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[IN THE COURT OF APPEAL.]

HOWELL *v.* DERING AND OTHERS.

[1912 H. 1807.]

Practice—Costs—"Issue"—"Event"—Rules of the Supreme Court, 1883, *Order* LXV., *rr.* 1, 2.

The plaintiff brought an action against (among others) a firm of stockbrokers to recover damages for having been induced by certain alleged false representations in a prospectus of a company to subscribe for shares in the company. The brokers were sued as having issued or authorized the issue of the prospectus. The brokers in their defence denied that they issued or authorized the issue of the prospectus, and further alleged that they had no knowledge of and did not admit any of the remaining allegations in the statement of claim. At the trial the judge asked the jury certain questions which with the answers thereto were as follows: (1.) Did the brokers authorize the issue of the prospectus?—No. (2.) Did the prospectus contain untrue statements of material facts or material omissions of facts?—Yes. (3.) Did the brokers believe that the prospectus was true, and had they reasonable ground for such belief?—Yes. (4.) Did the plaintiff take his shares relying upon the truth of the prospectus?—Yes. The judge directed judgment to be entered for the brokers with costs. The judgment as drawn up gave the plaintiff the costs of the issues stated in questions (2.) and (4.):—

Held, that these questions were not separate "issues" and the answers thereto were not "events" within the meaning of Order LXV., rr. 1 and 2, and that therefore the plaintiff was not entitled to any costs against the brokers.

APPEAL of the defendants Norman Paine, Noakes & Co. from the judgment of Bailhache J. at the trial of the action with a jury.

The action was brought against (among others) certain directors of a limited company called the Essequibo Rubber and Tobacco Estates, Limited, and Norman Paine, Noakes & Co., who were stockbrokers, to recover damages for loss sustained by the plaintiff owing to alleged false representations and concealment of material facts in the prospectus of the company, whereby he was induced to subscribe for 700 shares of 5*s.* each in the company. The defendants other than the directors were sued as promoters of the company, and all

the defendants were alleged to have issued or authorized the issue of the prospectus. The defendants Norman Paine, Noakes & Co. were brokers to the company, and their names appeared as such on the prospectus.

The defendants Norman Paine, Noakes & Co. in their defence denied that they were promoters of the company, or that they issued or authorized the issue of the prospectus; they denied that they falsely or at all made or authorized the making of the alleged or any representations, or that they concealed or authorized the concealment of any of the alleged facts; and they further pleaded that "these defendants have no knowledge of and do not admit any of the remaining allegations of the statement of claim."

The various defendants appeared separately and were separately represented at the trial. The trial lasted some days, and towards the end terms were arranged between the plaintiff and the first five defendants, including the directors, the charges of personal fraud made against them being withdrawn, and the case proceeded against, among others, the defendant brokers. The learned judge asked the jury certain questions, which with the answers of the jury thereto (so far as regards the defendants Norman Paine, Noakes & Co.) were as follows :—

1. Did the defendants Norman Paine, Noakes & Co. authorize the issue of the prospectus?—No.

2. Did the prospectus contain untrue statements of material facts or material omissions of facts?—Yes.

3. Did the defendants Norman Paine, Noakes & Co. believe that the prospectus was true, and had they reasonable grounds for such belief?—Yes.

4. Did the plaintiff take his shares relying upon the truth of the prospectus?—Yes.

Bailhache J. thereupon ordered that judgment should be entered for the defendants Norman Paine, Noakes & Co. with costs.

The judgment as drawn up, after reciting the above-mentioned questions and answers and that the judge ordered judgment to be entered for the defendants Norman Paine, Noakes & Co. with costs, stated (so far as material) that "it is further adjudged that

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the plaintiff recover nothing against the defendants Norman Paine, Noakes & Co., and that except as herein otherwise adjudged the said defendants recover against the plaintiff their costs of defence to be taxed. And the jury having found that the prospectus contained untrue statements of material facts or material omissions of facts, and that the plaintiff took his shares relying upon the truth of the prospectus, and the judge having made no order as to the costs of these issues, it is further adjudged that on taxation the plaintiff do have his costs of those issues against the defendants Norman Paine, Noakes & Co."

The defendants Norman Paine, Noakes & Co. appealed from the judgment so far as it directed that the plaintiff should have any costs against them, and asked that it should be ordered that the said defendants should recover against the plaintiff their costs of the action to be taxed.

It was stated that at the trial the defendant brokers took no part in the discussion as to the truth or falsity of the statements in the prospectus and called no evidence upon that matter.

Gore-Browne, *K.C.*, and *Schwabe*, *K.C.*, for the defendant brokers. The judgment is wrongly drawn up. The questions as to whether the prospectus contained untrue statements of fact or material omissions of fact, and as to whether the plaintiff took his shares relying upon the truth of the prospectus, were not "issues," nor were the answers of the jury thereto "events," within the meaning of Order LXV., rr. 1 or 2. The defendant brokers never contested those matters with the plaintiff. They contested the allegation that they were promoters of the company and issued or authorized the issue of the prospectus, and upon that they were successful. Every element which it is necessary for the plaintiff to establish in order to entitle him to relief in the action is not a separate "issue." "Issue" as used in those rules means an issue which necessarily results in relief. In *Myers* v. *Defries* (No. 2) (1) the issues were separate causes of action, and it was held that the word "event" in r. 1 must be read distributively as applying to each cause of action. In *Hoyes*

(1) (1880) 5 Ex. D. 15, 180.

v. *Tate* (1) there were two separate issues, one with regard to a tree and the other with regard to a fence, on each of which, if found for the plaintiffs, they would have been entitled to relief. The defendants were therefore held entitled to the costs of the issue on which they succeeded. In *Slatford* v. *Erlebach* (2) there were two distinct and separate issues. The first was whether a debt was due from the defendant to the plaintiff, and upon that the plaintiff succeeded. The determination of that issue was held to be an "event." The defendant, however, succeeded upon the second issue as to the Statute of Limitations, and therefore was successful in defeating the plaintiff's claim, but the plaintiff was held to be entitled to the costs of the issue upon which he succeeded, and the determination of which was held to be an "event." In that case the issue as to the existence of the debt would have resulted in the plaintiff getting relief but for the defendant's plea of the Statute of Limitations. In the present case the so-called "issues" upon which the judgment as drawn up gives the plaintiff his costs were merely questions of fact put to the jury, the answers to which, though forming a necessary part of the plaintiff's one cause of action, would not in themselves entitle him to any relief. The defendants are therefore entitled to recover from the plaintiff all their costs of the action. [*Hubback* v. *British North Borneo Co.* (3) was also referred to.]

J. B. Matthews, K.C., and *P. B. Morle*, for the plaintiff. The word "issue" in Order LXV., rr. 1, 2, does not mean cause of action. Light is thrown upon the meaning of the word by the practice before the Judicature Acts. By r. 3 of the Pleading Rules of Hilary Term, 1853 (set out in Lush's Practice, 2nd ed., p. 890; 3rd ed., pp. 896, 897), where there was more than one count, plea, replication, or subsequent pleading "founded on the same cause of action or ground of answer or defence," and the judge at the trial so certified, the party so pleading was liable to the opposite party for all costs occasioned by such count, plea, or other pleading in respect of which he failed to establish a distinct cause of action, or distinct ground of answer or defence. See also r. 62 of the Practice Rules of Hilary Term, 1853 (Lush's

(1) [1907] 1 K. B. 656. (2) [1912] 3 K. B. 155.
(3) [1904] 2 K. B. 473.

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Practice, 2nd ed., p. 866; 3rd ed., p. 902). In Lush's Practice, 2nd ed., p. 426; 3rd ed., p. 569, it is said that "the postea belongs to the party substantially succeeding in the cause. For example, if the defendant obtains a verdict on a plea which goes to the whole cause of action he is entitled to the postea and to sign judgment, notwithstanding that all the other issues are found for the plaintiff. But if the plaintiff succeeds as to any part of the cause of action, and has damages, the postea belongs to him, although the costs due to the defendant on the other issues will exceed those of the plaintiff; as where a certificate is given which prevents the plaintiff from recovering more costs than damages." Therefore before the Judicature Rules "issue" was not necessarily co-extensive with a cause of action. So also under the rules made under the Judicature Acts "issue" does not mean a cause of action. The question must be regarded from the point of view of the pleader. The defendant, when he puts in his defence, creates the issues in the action. In *Wagstaffe* v. *Bentley* (1) there was one cause of action, namely, a cause of action for personal injury to the plaintiff owing to the negligence of the defendants. The defendants denied the negligence, and alternatively paid money into Court with a denial of liability. The jury found a verdict for the plaintiff for less than the sum paid into Court. The Court of Appeal held that the defendants had raised distinct issues by their defence, and that they must pay the costs of the issue of negligence upon which they had failed.

An "issue" may be said to be that which the defendant raises in his defence and which, if proved, is an answer to the whole of the plaintiff's cause of action. In *Hubback* v. *British North Borneo Co.* (2) the Court did not even go so far as that, but treated as an issue the question whether the plaintiff was entitled to six months' or nine months' half-pay. That case is strongly in favour of the plaintiff, because it shows that there may be an issue raised by the defence which does not go to the whole cause of action. Each of the issues raised in the present case by the defence would, if answered in favour of the defendants, be an answer to the whole of the plaintiff's cause of action.

(1) [1902] 1 K. B. 124. (2) [1904] 2 K. B. 473.

[KENNEDY L.J. In *Hubback* v. *British North Borneo Co.* (1) the Court was asked to make a special order as to the costs. The Court of Appeal was there exercising the discretion of the judge at the trial. The question in the present case is whether the judgment has been properly drawn up upon the order of the judge at the trial.]

If the issue in that case had gone to the whole cause of action, a special order would not have been necessary. In *Slatford* v. *Erlebach* (2) there were two issues tried before the official referee. The first was whether a debt was due from the defendant to the plaintiff, and that issue was determined in favour of the plaintiff. The second was whether the remedy for that debt was barred by the Statute of Limitations, and that issue was decided in favour of the defendant. The plaintiff was held to be entitled to the costs of the issue on which he succeeded, though it was not, as Vaughan Williams L.J. said (at p. 160), "an effective event, because the plaintiff recovered nothing." The report of the official referee was equivalent to the verdict of a jury: Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 15, sub-s. 2. Therefore that case falls into line with the other cases, and is in favour of the present plaintiff, who succeeded on an issue raised by the defendant brokers in their defence, though he recovered nothing upon that issue. The brokers chose to traverse the allegations in the statement of claim that the prospectus contained untrue statements of material facts and material omissions of facts, and made that an issue upon which they failed, and must pay the costs thereof. In *Daniel* v. *Barry* (3), to a declaration for deceitfully warranting that a ship was fit to be classed as "A. 1" in Lloyd's Register, the defendant pleaded, first, "not guilty," and second, a denial of the unfitness of the ship to be so classed. The jury found a verdict for the defendant on the first issue, and for the plaintiffs on the second. The Court held that, as the defendant had chosen to sever the issues, instead of merely pleading the general issue, he must pay the costs of the issue which he had himself raised and on which he had failed. This was followed later in the same year by the Court of Exchequer

(1) [1904] 2 K. B. 473. (2) [1912] 3 K. B. 155.
(3) (1843) 4 Q. B. 59.

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in *Nicholson* v. *Dyson*. (1) The defendant must now in his defence deal specifically with each allegation of fact in the statement of claim, and an issue is created when a defence is pleaded to the whole cause of action. The refusal to admit, which has the same effect as a denial, that the prospectus contained untrue statements or material omissions of fact was in itself a defence to the whole cause of action. The plaintiff is therefore entitled to have the costs of the two issues on which he succeeded. [*Brown* v. *Houston* (2), *The Blanche* (3), *Cole* v. *Christie, Manson & Woods* (4), and *Badische Anilin und Soda Fabrik* v. *Levinstein* (5) were also referred to.]

Gore-Browne, K.C., in reply. The words "issue" and "event" in Order LXV., rr. 1 and 2, are co-extensive. In *Myers* v. *Defries* (No. 1) (6) Bramwell L.J. pointed out that "event" cannot mean the verdict of the jury; and in *Myers* v. *Defries* (No. 2) (7) he said that "'event' means not merely the finding of the jury, but the event of the cause. If the plaintiff relies upon several grounds of suit, there may be several 'events,' and in my opinion 'event' may be read as a nomen collectivum. Suppose that the word 'result' had been used: could it be successfuly contended that a defendant is entitled to no costs upon the causes of action as to which he has succeeded, because he has failed as to others?" That sentence gives the clue to the meaning of the rule. Instead of stating a cause of action, as was done under the old form of pleading, the plaintiff now states specific facts. If the defendant does not in his defence admit each statement of fact he does not thereby set up separate issues. By denying the facts alleged he pleads what is equivalent to the general issue. If he raises in addition a specific defence, such as the Statute of Limitations, he raises an issue as to that. Here there were no separate issues. If the learned judge at the close of the plaintiff's case had ordered judgment to be entered for the defendants upon the ground that there was no evidence that they had authorized the issue of the

(1) (1843) 11 M. & W. 545.
(2) [1901] 2 K. B. 855.
(3) [1908] P. 259.
(4) (1910) 26 Times L. R. 469.
(5) (1885) 29 Ch. D. 366.
(6) (1879) 4 Ex. D. 176, at p. 180.
(7) 5 Ex. D. 180, at p. 185.

prospectus, the defendants would have been entitled to all their costs. An "issue," as regards the plaintiff, may be defined as that which the plaintiff has to prove so as to succeed in obtaining judgment in the absence of the defendant. That is one single "issue," upon which there is one "event." Many facts may have to be proved to give the plaintiff a right to relief, but each fact necessary to be proved is not a separate issue. If the plaintiff fails to prove one he fails to prove his case, and the defendant will be entitled to his costs. This view will create no injustice, because any party can, under Order xxxii., r. 4, call upon the other party to admit facts, and the refusal to admit may entail consequences as to costs. The fact of asking the jury questions as to particular matters, instead of asking them to find a general verdict, does not make those questions "issues" and the answers to them "events."

BUCKLEY L.J. The plaintiff sued several defendants, including the present appellants, to recover damages for having induced him by alleged false statements in a prospectus to subscribe for 700 shares of 5*s*. each in a company. The appellants were the brokers whose names appeared on the prospectus. The action was tried before Bailhache J. and a jury, and the learned judge left to the jury certain questions of which four only are relevant to this appeal. Two of them were these: "Did the defendants Norman Paine, Noakes & Co. authorize the issue of the prospectus?" Answer, No. "Did the defendants Norman Paine, Noakes & Co. believe that the prospectus was true, and had they reasonable grounds for such belief?" Answer, Yes. The result was that the learned judge gave judgment for the appellants with costs. Two other questions, however, were left to the jury. They were these: "Did the prospectus contain untrue statements of material facts or material omissions of facts?" Answer, Yes. "Did the plaintiff take his shares relying upon the truth of the prospectus?" Answer, Yes. The judge having given judgment for the appellants with costs, the associate's certificate simply stated the result in that form. The judgment, however, as drawn up, after adjudging that the appellants recover against the plaintiff their costs of defence to be

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taxed, proceeded: "And the jury having found that the prospectus contained untrue statements of material facts or material omissions of facts, and that the plaintiff took his shares relying upon the truth of the prospectus, and the judge having made no order as to the costs of these issues, it is further adjudged that on taxation the plaintiff do have his costs of those issues against the defendants Norman Paine, Noakes & Co." The appellants contend that the judgment has been wrongly drawn up in that, the action having been dismissed as against them with costs, they have been ordered to pay the costs above mentioned. The judgment was drawn up in that form because the officer who drew it up believed that he was bound so to draw it up having regard to Order LXV., r. 1. The relevant words of that rule are: "Provided also that where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the Court, shall, for good cause, otherwise order." The officer took the view that each of the two questions which I have last read was an "issue" and that the answer of the jury thereto was an "event" within the meaning of the rule, and that therefore the costs of each of those issues must follow the event. The question is whether that is right.

The questions to be determined are, first, what is the meaning of the word "issue," and, second, what is the meaning of the word "event," in Order LXV., r. 1? It is impossible to say that every question of fact which is in dispute between a plaintiff and a defendant is an "issue." The word can be used in more than one sense. It may be said that every disputed question of fact is in issue. It is in a sense, that is to say, it is in dispute. But every question of fact which is "in issue" and which a jury has to determine is not necessarily "an issue" within the meaning of the rule. I should define "issue" for the purposes of this rule in some such words as these: An issue is that which, if decided in favour of the plaintiff, will in itself give a right to relief, or would, but for some other consideration, in itself give a right to relief; and if decided in favour of the defendant will in itself be a defence.

Applying that test, the question whether the prospectus

contained untrue statements of material facts or material omissions of facts was quite irrelevant until evidence had been adduced to connect the defendants with the issue of the prospectus. If at the trial counsel for the plaintiff were in the first instance to adduce evidence to show that the prospectus contained untrue statements, I apprehend that the judge might properly exclude the evidence until a foundation had been laid for it by connecting the defendants with the issue of the prospectus. It is a question which, however it is answered, does not in itself lead to relief. Coupled with other questions of fact it may be one link in a chain which, if answered in a certain way, does lead to relief. In the next place, was the answer of the jury to that question an "event"? In my opinion it was not. An "event" within the meaning of the rule is an outcome of the presentation to the tribunal of some claim made by the plaintiff against the defendant which results in a finding that the plaintiff is or is not entitled to relief against the defendant. The answer "Yes" to the question, whether the prospectus contained untrue statements of facts, in itself leads to nothing. It is therefore not an "event." As Bramwell L.J. pointed out in *Myers* v. *Defries* (No. 1) (1), even the verdict of the jury is not necessarily the "event." The jury may find a verdict for the plaintiff, and upon a question of law the judge may rule that the verdict should be entered for the defendant. The event is the outcome or result of the proceedings.

A further consideration, which was put forward by Mr. Gore-Browne in reply, seems to me to be exceedingly apposite. Suppose that the defendant does not appear at the trial, an "issue" is that which the plaintiff must prove in order to entitle him to relief. An isolated question of fact is not an "issue." An "issue" is that which results in a determination or adjudication in favour of one party or the other.

So far I have dealt with the matter without reference to the authorities. I will take the more recent cases in order of date to shew that they bear out what I have said. In *Wagstaffe* v. *Bentley* (2) the action was to recover damages for injuries to the plaintiff arising from the negligence of the defendants. The

(1) 4 Ex. D. 176, at p. 180. (2) [1902] 1 K. B. 124.

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defendants denied negligence, and, alternatively, with a denial of liability paid money into Court in satisfaction of the claim. The questions raised were therefore two: first, whether there was negligence, and, second, if there was negligence, whether the sum paid into Court was sufficient. Those were two separate issues. The plaintiff succeeded on the issue of negligence and was held to be entitled to his costs upon it. That was an issue which would have entitled him to relief, but it was met by the fact that the sum paid into Court was sufficient to satisfy his claim. The next case is *Hubback* v. *British North Borneo Co.* (1) The action was for wrongful dismissal. There was an admission of liability with a payment into Court, and the only question was the amount of the damages. The question to be determined was whether the plaintiff was entitled to six months' or nine months' half-pay. The Court determined that question, and then it had to decide what order ought, in its discretion, to be made as to costs. The Court, in exercising its discretion, treated the question of six months' or nine months' half-pay as if it were a separate issue and made an order accordingly. The case did not come within Order LXV., r. 1, at all. In *Hoyes* v. *Tate* (2) the plaintiff sued the defendant for trespass and damage to a fence and for cutting down and removing a tree. There were thus two separate issues: to whom did the fence belong, and to whom did the tree belong. The jury found that the fence belonged to the plaintiff, and that the tree belonged to the defendant. The judge at the trial directed judgment to be entered for the plaintiff for the damages awarded by the jury and the general costs of the action, and made no order as to the costs of the issue as to the ownership of the tree. In those circumstances it was held that the defendant was entitled to have the judgment so drawn up as to give him the costs of the issue on which he had succeeded. That was clearly right within Order LXV., r. 1, but it has nothing to do with the present case. That case is like *Myers* v. *Defries* (No. 2) (3), where the plaintiff sued in respect of three causes of action, and it was held that the word "event" must be read distributively.

(1) [1904] 2 K. B. 473. (2) [1907] 1 K. B. 656.
(3) 5 Ex. D. 15, 180.

The last case to which I wish to refer is *Slatford* v. *Erlebach*. (1) It affords a good illustration of the proposition which I stated in the earlier part of this judgment. The plaintiff, a builder, sued for the balance of the contract price of building a house. The first defence was that the work had been unsatisfactorily carried out, and that there was nothing due to the plaintiff. There was an issue, therefore, whether the defendant was debtor to the plaintiff. Upon that issue the plaintiff succeeded. He proved that there was money due to him from the defendant. There was, however, a second defence, namely, that the debt was barred by the Statute of Limitations. Upon that issue the defendant succeeded. Therefore upon the issue of debt or no debt the event or outcome or result was an adjudication that there was a debt, but that was displaced by the fact that by reason of the Statute of Limitations the debt could not be enforced. There was therefore an issue decided in favour of the plaintiff which in itself would have given him a right to relief, if it had not been displaced by another consideration, namely, the Statute of Limitations.

Those are the authorities. How do they bear on the present case? The plaintiff sued the brokers upon the ground that they authorized the issue of the prospectus. The jury found that they did not. Upon that finding it became irrelevant as against them to inquire whether the statements in the prospectus were or were not untrue. Nevertheless the plaintiff says that, though he failed to connect the brokers with the issue of the prospectus, inasmuch as they did not admit the fact of its untruth, he is entitled as against them to the costs of proving that the prospectus was not true. I see no relation between the cases to which I have referred and this case. The jury answered a question of fact which in itself did not lead to any relief. It was not an "issue," and the answer of the jury was not an "event" within the meaning of the rule. It was a question which in the result was wholly irrelevant as between the plaintiff and the appellants. Suppose that at the close of the plaintiff's case the judge had withdrawn the case as against the appellants from the jury upon the ground that there was no evidence to

(1) [1912] 3 K. B. 155.

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connect them with the prospectus, they would have been entitled to all their costs. When the judge dismissed the action as against them with costs there were no separate issues with events arising thereon within the meaning of the proviso to Order LXV., r. 1, upon which the plaintiff was entitled to costs.

The judgment therefore as drawn up must be amended by striking out so much of it as gives the plaintiff the costs of any issues against the appellants.

KENNEDY L.J. I am of the same opinion. We have had an interesting argument upon a matter which seems to me to be one of some difficulty. I think that the word "issue" as used in the rules is not always used in exactly the same sense. The word occurs in Order XXXIV., r. 9, in which power is given to the parties to agree as to what are the questions of fact to be decided between them, and to proceed to the trial of any such questions of fact without formal pleadings, and such questions may be stated for trial in an issue, "and such issue may be entered for trial and tried in the same manner as any issue joined in an ordinary action." There clearly the word "issue" means something that is decisive, or at any rate an essential contention between the parties; and if there is only one contention the success or failure of the plaintiff will depend upon its decision. Turning to Order LXV., r. 1, I think it is clear that the word "issue" must have a somewhat wider meaning, but, though in my opinion that is so, I do not think that the meaning of the word in the later Order is wide enough to justify the judgment as drawn up. The material words in Order LXV., r. 1, are: "Provided also that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the Court, shall, for good cause, otherwise order." And again r. 2 provides that "when issues in fact and law are raised upon a claim or counter-claim, the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event." One might say that "issues" may mean the questions in an action, subject generally to this limitation, that an issue must give rise to some result on a contention of fact which is

essential to the decision of the case and which is conclusive in the absence of some other fact displacing it. I hesitate, however, to accept that limitation as being complete, after the decision in *Wagstaffe* v. *Bentley* (1), because in the opinion of Stirling and Mathew L.JJ. there were three issues in that case, one of which at any rate could not by itself have been conclusive. The action was to recover damages for personal injuries owing to the alleged negligence of the defendants. The defence was a denial of negligence, a plea of contributory negligence, and a payment into Court with a denial of liability. Stirling and Mathew L.JJ. held that there were not merely two issues, one of negligence and the other of the sufficiency of the sum paid into Court, but that there was a third issue as to contributory negligence. A finding of contributory negligence would, no doubt, have been fatal to the plaintiffs; but it was regarded as a separate issue, although, if found in favour of the plaintiffs, it is obvious that it would in no sense of itself have been decisive of the matter between the parties. Stirling L.J. says this (2): "The defence denies any negligence on the part of the defendants, and alleges contributory negligence, and, alternatively, the defendants, while denying liability, bring into Court 80*l.* as sufficient to cover any claim of the plaintiffs. . . . . The question that arises is whether there are any issues which were found in the plaintiffs' favour. It seems to me, looking at the pleadings and the result of the trial, that two issues were found for the plaintiffs, namely, those arising on the allegations of negligence and contributory negligence." He treats the issues as three, though the issue of contributory negligence, if found in favour of the plaintiffs, would not prove that the defendants were negligent, which was essential to the plaintiffs' case. Mathew L.J. puts the matter in the same way (2): "The points raised in this action were—negligence, contributory negligence, and the amount of damages to which the plaintiffs would be entitled in the event of their succeeding in the action. The issues on the points so raised were before the jury." Therefore I do not think that it would be right to say that the "issue," to which rr. 1 and 2 of Order LXV. apply, must necessarily be some question the answer

(1) [1902] 1 K. B. 124. (2) [1902] 1 K. B. at p. 127.

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to which is conclusive of the case. I think, however, that there is a wide margin between that and a mere finding of fact, which is merely a link or step in the proof of that which is conclusive. That is all that there is in this case. Take this example. Suppose that a plaintiff sued upon a contract and alleged that he made the contract with the defendant in July in London, and alternatively that he made it in October in Edinburgh. Suppose that the jury found that the contract was not made in July in London, but was made in October in London, would it be right to say that there were two "issues" within the meaning of Order LXV., r. 1, seeing that the jury found that the contract was made? No doubt the judge might properly in such a case make a special order as to the costs, if any, incurred by the defendant owing to the allegation upon which the plaintiff had failed. The essential matter, however, was that the contract was proved, and I do not think that the other allegation, even under the modern system of pleading, would be an "issue" within the meaning of the rule. The real issue was as to the making of the contract, and in the absence of a special order the defendant would not get the costs of the allegation which failed.

In the present case there are two findings of the jury set out in the judgment as drawn up, the costs of which have been given to the plaintiff as against these defendants. The first is that the prospectus contained untrue statements of fact or material omissions of fact, and the second is that the plaintiff took his shares relying upon the truth of the prospectus. They were no doubt put in issue by the defendants, but they were only links in a chain every link of which had to be made good before liability could attach to the defendants. To call them "issues" within the meaning of the rule would be to give to the word "issue" a wider meaning than can properly be given to it. If a plaintiff, according to the modern system of pleading, sets out a number of facts which he deems to be material to his case, each one will constitute an issue of fact; but it seems to me to be impossible to say that each of those questions of fact is an "issue" within the meaning of Order LXV., rr. 1 and 2. I do not think that it is easy or indeed possible, looking at the decisions of the Court of

Appeal which are binding upon us, to say that an "issue" within the meaning of the Order must be one which is decisive of the case, unless it is displaced by some other consideration, because, as in *Wagstaffe* v. *Bentley* (1), it is clear that the question of contributory negligence, though not decisive, except where found in favour of the defendant, was looked upon as an "issue." Still an "issue," as it seems to me, must be something so distinct and separate in itself that the decision of it constitutes an "event" within the meaning of the rules. It may be said—and I appreciate the difficulty—that that is only getting out of one difficulty by getting into another. I do not think that the word "event" has any defined meaning. I think it means result; but it must be such a material result as does not constitute merely a link in a chain. It must be the result of some definite and important issue, and not merely the finding of a fact which is alleged by the plaintiff, but which, when proved, is by itself and without assistance of no value to him as creating the liability which the action seeks to impose upon the defendant.

In my opinion the appeal should be allowed. It is a case in which the judge might have made a special order if he had thought that these defendants ought not in the circumstances to have traversed these allegations and to have put the plaintiff to the proof of them. Clearly he never intended to make any special order in this case, and I think that without a special order the judgment ought not to have been drawn up giving the plaintiff the costs of those issues.

PHILLIMORE L.J. I agree that the appeal should be allowed, and I desire to indicate the steps by which I arrive at this conclusion. We are construing Order LXV., rr. 1 and 2. In my opinion r. 1 has little application to this case. It has this application: that, as the case was tried with a jury, the costs must follow the event unless good cause to the contrary is shown. I do not think that the word "issue" in that rule means one of several issues to be tried, or, if there is only one issue in the action, that issue. I think that it means an issue directed to be tried, such as an interpleader issue, or an issue

(1) [1902] 1 K. B. 124.

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directed under Order xxxiv., r. 9, or the kind of issue which the Common Law Courts before the Judicature Acts were in the habit of directing, and which the High Court now directs, to inform the conscience of the Court, as in habeas corpus and other matters. I come to this opinion largely on historical grounds. The rule as to costs in the schedule to the Judicature Act, 1873, was r. 47, and it ran thus: "Subject to the provisions of this Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court." Then followed the clause, which appears in all subsequent rules, protecting trustees, mortgagees, and others. Before that rule came into operation it was altered in 1875 (becoming Order LV.) by the addition of the proviso that "where any action or issue is tried by a jury the costs shall follow the event," unless for good cause it was otherwise ordered. That remained the rule until the Rules of 1883. In r. 1 of Order LXV.—which took the place of Order LV.—the words "action or issue" were enlarged into "action, cause, matter, or issue." That shows that what was being dealt with was the trial of an issue as such. For the first time r. 2 was added, which I think is the important rule to consider. Rule 2 says: "When issues in fact and law are raised upon a claim or counter-claim, the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event." I take "event" there to mean the event of the tried issue; and I take that rule as having confirmed the practice before the Judicature Act, or as having reintroduced it. The note in the Annual Practice, 1914, p. 1199, is, I think, correct: "This rule, which was introduced in 1883" and amended in 1902, "appears to be merely declaratory of the previous practice. Compare Reg. Gen. H. T., 1853, r. 62. It applies the same rule to jury and non-jury cases." We are no longer dealing with the trial of an issue under r. 1; we are dealing with the trial of an action in which there may be more than one issue, and if there is more than one issue the costs will be distributable. The plaintiff or defendant may recover generally, but may fail on particular issues and have to pay the costs of those issues. The plural "issues" might, no doubt, be satisfied by the fact that now a plaintiff can combine

several causes of action in one writ; or it might be satisfied by the fact that a defendant can counterclaim. I do not, however, think it right to narrow the word "issues" in that way, and the decisions have said that it is not to be so narrowed. *Wagstaffe* v. *Bentley* (1), *Hubback* v. *British North Borneo Co.* (2), and *Slatford* v. *Erlebach* (3) show that there may be more than one issue in an action where there is only one cause of action and where there is no counter-claim. What, then, are "issues"? To a great extent we can get help from the old procedure, and so far as we can get such help it is in favour of the appellants. From time to time the Common Law Courts restricted what could be put in issue by the general issue. I take it from the argument in *Daniel* v. *Barry* (4) that "before the new rules"—that is, Reg. Gen. H. T., 4 Will. 4 (5)—"infancy of the defendant, or bankruptcy of the plaintiff, or that he was an alien enemy, might have been proved under non assumpsit." Those rules prohibited that, and said that these defences must be specially pleaded. In an action of trover, at any rate since those rules, if the defendant wished to put in issue the plaintiff's title, he could not do so under the general issue, but would have to plead it specially. (6) In all these cases there would have been a separate issue, because there was always a separate issue upon every count in the declaration, and upon every plea to every count; but except in such cases it was not necessary to plead specially. Those who pleaded specially might find themselves in trouble, as in *Daniel* v. *Barry* (7) and *Nicholson* v. *Dyson.* (8) The Court of Appeal in the cases which have been referred to, in construing the present rule, following apparently the analogy of the old procedure, has in substance said that there are certain issues which are independent of the general issue, and upon which costs may be separately awarded. If, for instance, a defendant pleads the Statute of Limitations, he merely calls the attention of the Court to an Act of Parliament. But it has

(1) [1902] 1 K. B. 124.
(2) [1904] 2 K. B. 473.
(3) [1912] 3 K. B. 155.
(4) 4 Q. B. 59, at p. 61.
(5) See 5 B. & Ad., Appendix, p. viii.
(6) See 5 B. & Ad., Appendix, p. ix.
(7) 4 Q. B. 59.
(8) 11 M. & W. 545.

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always been said that a defendant must plead it specially if he is going to rely upon it; and the Court of Appeal in *Slatford* v. *Erlebach* (1) has accordingly said that the issue of never indebted and the issue of the Statute of Limitations are two separate issues. Therefore in that case the costs were distributed. In the old days if a defendant pleaded payment into Court, he admitted the cause of action, and the only issue was whether the amount paid in was sufficient. Now that a defendant may plead payment into Court with a denial of liability, there are in such a case two issues: one whether there is a cause of action; and the other, whether, if so, the payment into Court is sufficient; and so it was decided in *Wagstaffe* v. *Bentley*. (2) So also with regard to the case of *Hoyes* v. *Tate* (3); under the old law there would have had to be separate pleas.

Now the traverses in a statement of defence are not separate pleas. They are merely traverses directed by the modern system of procedure in a more particular form than formerly of the allegations in a statement of claim. It seems to me that it would be wrong to apply any such rule to them as was applied in the old days to pleas. In my view an issue is that which, if found in favour of the plaintiff, will, unless there is some other issue interfering with it, give him a verdict or judgment. That being so, it seems to me that here there was but one issue to be determined. Had the plaintiff made out a case for the recovery of damages in this action from these particular defendants? That was the issue which had to be tried, and it might have been broken up into any number of questions. It entailed the examination of several different allegations of fact, but it was one issue, and therefore the costs of it ought to go to the party who succeeded upon that issue.

For these reasons I think that the appeal should be allowed.

Appeal allowed.

Solicitor for plaintiff: *F. Daphne.*

Solicitors for defendants: *Wansey, Stammers & Co.*

(1) [1912] 3 K. B. 155. (2) [1902] 1 K. B. 124.
(3) [1907] 1 K. B. 656.

W. F. B.

[IN THE COURT OF APPEAL.]

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JOSEPH TRAVERS & SONS, LIMITED *v.* COOPER.

[1913 J. 854.]

Carrier—Carriage of Goods by Lighter—Exemption from Liability "for any damage to goods however caused which can be covered by insurance"—Damage owing to Negligence of Lighterman while in Transit—Evidence uncertain whether Negligence caused the Loss—Bailment — Onus of Proof.

Goods were loaded into a barge from a ship for delivery at the barge owner's wharf in the Thames under a contract which exempted the barge owner from liability "for any damage to goods however caused which can be covered by insurance." While the barge was lying alongside the wharf with the goods on board before being unloaded the barge owner's lighterman who was in charge of the barge negligently left her unattended at night; and the barge, after taking the ground at low tide, became submerged as the tide rose, and the goods were damaged. In an action against the barge owner to recover damages for the loss so caused there was no direct evidence as to the cause of the barge being submerged and the evidence left it in doubt whether the submerging was or was not attributable to the negligent act of the defendant's servant in leaving the barge unattended:—

Held, (1.) by the whole Court, that the onus lay on the defendant, who was in possession of the goods as bailee, of shewing that the negligence of his servant in leaving the barge unattended did not cause the loss, and that he had failed to discharge that onus; (2.) by Kennedy and Phillimore L.JJ., Buckley L.J. dissenting, that the term in the contract exempting the defendant from liability for damage "however caused" relieved him from liability for damage caused by the negligence of his servant, and that therefore he was entitled to judgment.

Appeal from the judgment of Pickford J. at the trial without a jury of an action in the commercial list.

The action was brought to recover damages for the loss of or damage to 5518 cases of tinned salmon, the property of the plaintiffs, owing to the alleged negligence of the defendant while they were in the defendant's barge. The defendant was a wharfinger and warehouseman, and he also undertook for reward lighterage for customers resorting to his wharf. He performed this lighterage sometimes in barges of his own and sometimes in hired barges. The following clause was printed at the head of all the defendant's letters, memoranda, and invoices: "The

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rates charged by me for lighterage are for conveyance only. I will not be responsible for any damage to goods however caused which can be covered by insurance. Merchants are advised to see that their policies cover risk of craft and are made without recourse to lighterman." On January 2, 1913, the plaintiffs, who were customers of the defendant, instructed the defendant to collect 12,021 cases of tinned salmon from the steamship *Iyo Maru*, which had arrived in the Royal Albert Dock, and deliver them by lighter at the defendant's wharf. It was admitted that the lighterage of the cases was upon the terms contained in the above-mentioned clause printed at the head of the defendant's letters, memoranda, and invoices. Accordingly 5518 cases, part of the above-mentioned 12,021 cases, were loaded from the ship into the barge *Mabel*, and on January 9 the barge was by arrangement between the parties taken by the defendant's lighterman to the Aberdeen Steam Wharf, and was there made fast alongside at about 4 P.M. She was to remain there until about 1 A.M. the next morning, when she would have to be moved to make room for a steamer which was expected to arrive. The lighterman left the barge at about 6.40 P.M. unattended, the barge being then afloat, and he returned again at about 9 P.M., when she was about to take the ground. He then went away again. Low water was at 10.27 P.M. He returned again shortly after midnight, when he found that the water was flowing over her cabin top and into her hold, and she became submerged and her cargo was damaged.

The defendant in his points of defence denied negligence or that the negligence caused the loss, and in the alternative he relied upon the clause above set out as relieving him from the consequences of his servant's negligence.

At the trial before Pickford J. there was no direct evidence as to the cause of the barge becoming submerged. The plaintiffs alleged that the submerging was caused by the barge, as she rose with the tide, being caught under a horizontal piece of wood which was fixed along the face of the wharf, or, as it was called, being underpinned, and that consequently she was prevented from rising as she should have done, and that this would not have happened if she had not been left unattended, and that

therefore the loss occurred through the negligence of the defendant's lighterman in leaving her unattended. The defendant alleged that the barge when she took the ground at low tide became mudsucked, and that when the tide rose she was held down and unable to rise with the tide, and that if the lighterman had been there he could not have prevented the mischief.

Pickford J., in his judgment, said that there were the greatest possible difficulties in the way of both those theories, but upon the whole he came to the conclusion that the difficulties in the way of saying that she was underpinned were greater than those in the way of saying that she was mudsucked, and that "therefore on the whole I come to the conclusion that the evidence leads me to say that this arose from mudsucking and not from being underpinned." It was admitted that neither mudsucking nor underpinning, whichever happened, was occasioned by the negligence of the defendant's servant, but it was said that it could have been avoided, that is to say, that the barge could have been freed, if the man in charge had been there. In his opinion it clearly was negligence on the part of the man in not being there. Then came the question whether that negligence was the cause of the accident, and that depended upon whether, if the man had been there, he could have avoided the consequences of the mudsucking, that was to say, whether he could have freed the barge. "Mr. Leck argued that, once I find negligence, it is for the defendant to prove conclusively that that negligence could not have been the cause of the accident, that is to say, to prove conclusively that the man could not have done anything to free the barge. I do not think that is the right point of view. I think that in this case, just as in any other, it is for the plaintiffs to prove that the negligence which occurred was the cause of the accident. It is not enough to say that there was negligence which did not cause the accident. They must prove that there was negligence which did cause it. I have had considerable difficulty about that point, but I must say that, with some regret, I have come to the conclusion that it is not proved to me that if he had been there he could have avoided the accident. I doubt very much whether, with a barge of this

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size (she was a large barge), a hitcher would have been of any use. A hitcher is supposed to be used, if a barge is mudsucked, to steer underneath her, to let air underneath her, and so allow her to rise. I do not think I have any satisfactory evidence that that could be done with a barge of this size at all." Nor was there any evidence that, if a man had been there, he could have obtained the assistance of a tug or some such assistance to pull her off. He therefore with some regret, because he did not like to free the defendant from the consequence of what he thought was negligence, came to the conclusion that it was not shown that that negligence was the cause of the accident. That being so, it was not necessary for him to give any definite decision upon the point raised under the contract freeing the defendant from liability for loss however caused, but the inclination of his opinion was that the defendant would not be protected by it. He thought that the case was not distinguishable from *Price* v. *Union Lighterage Co.* (1) He gave judgment for the defendant.

The plaintiffs appealed.

Leck, K.C., and *F. D. Mackinnon*, for the plaintiffs. The learned judge, having found that the defendant's servant was guilty of negligence in leaving the barge unattended, was wrong in holding that in those circumstances the onus was on the plaintiffs to prove that the negligence caused the loss. The onus was on the defendant to show that his negligence did not cause the loss. There was no direct evidence to shew how the barge became submerged. In the unreported case of *Morison, Pollexfen & Blair* v. *Walton* (2), in the House of Lords, the action was for breach of contract by the defendant to tow a fire-float from the Downs to Genoa, whereby he agreed to provide the necessary men to put on board the firefloat for steering her and attending to her lights. He broke that term of the contract. The firefloat had no men on board of her. Heavy weather was encountered and she sank while being towed. The evidence was conflicting as to the cause of her loss and whether the loss could have been averted by the presence of men on board of her. The

(1) [1903] 1 K. B. 750; [1904] 1 K. B. 412.
(2) Unreported, May 10, 1909.

judge who tried the case came to the conclusion that the loss would probably have been averted if the men had been on board. Lord Loreburn L.C., while agreeing that there was evidence to support the learned judge's decision, said (1): "I prefer, however, to rest my opinion on a different reason. Here is a bailee who, in violation of his contract, omits an important precaution, found by the learned judge upon ample evidence to be necessary for the safety of the thing bailed to him, and which might have prevented the loss. And his breach of contract has the additional effect of making it impossible to ascertain with precision and difficult to discover at all what was the true cause of the loss. I cannot think it is good law that in such circumstances he should be permitted to saddle upon the parties who have not broken their contract the duty of explaining how things went wrong. It is for him to explain the loss himself, and if he cannot satisfy the Court that it occurred from some cause independent of his own wrong-doing he must make that loss good." And Lord Halsbury said: "It appears to me that here there was a bailment made to a particular person, a bailment for hire and reward, and the bailee was bound to shew that he took reasonable and proper care for the due security and proper delivery of that bailment; the proof of that rested upon him." Therefore, negligence having been established on the part of the defendant, it lay upon him to show that that negligence did not cause the loss: *Phipps* v. *New Claridge's Hotel.* (2) In *Dollar* v. *Greenfield* (3) the House of Lords adopted the language of Erle C.J. in delivering the judgment of the Exchequer Chamber in *Scott* v. *London and St. Katherine Docks Co.* (4), and applied it to the case of a bailment and held that "the defendant was bound to restore the subject of the bailment in the same condition as that in which he received it, and it was for the defendant to explain or offer valid excuse for not having done so. It was for him to prove that reasonable care had been exercised." The defendant has not shown that his negligence

(1) This passage and that cited from Lord Halsbury's opinion were cited from a transcript of the shorthand notes of the opinions delivered in the House of Lords.
(2) (1905) 22 Times L. R. 49.
(3) (1905) *The Times*, May 19.
(4) (1865) 3 H & C. 596.

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did not cause the loss. Therefore, even assuming that the loss occurred through the barge being mudsucked, the defendant failed to satisfy the onus which was upon him. Further, the evidence showed that the loss occurred through the barge being underpinned, which could have been avoided if the defendant's lighterman had been on board. The learned judge was therefore wrong in holding that the defendant was not liable for the loss of the plaintiffs' goods.

Adair Roche, K.C., and *Cranstoun*, K.C., for the defendant. The bailor of goods has in the first instance to show that there is some connection between the negligence of the bailee's servants and the loss: *Giblin* v. *McMullen* (1); *Medawar* v. *Grand Hotel Co.* (per A. L. Smith J.) (2); *Brind* v. *Dale.* (3) As Lord Kenyon said in *Finucane* v. *Small* (4), "to support an action of this nature positive negligence must be proved." Mere proof of loss is not evidence of loss by negligence, unless the circumstances are such as of themselves show that there must have been negligence. The plaintiffs must give some evidence of negligence causing the loss. It lies then upon the defendant to explain the circumstances under which the loss occurred. This is shown by *Scott* v. *London and St. Katherine Docks Co.* (5) and *Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Co.* (6) In this latter case it was said that if nothing more were known than that an insured ship capsized and sank in less than twenty-four hours after leaving port without having encountered any storm or other known cause sufficient to account for the catastrophe, there would be a presumption of unseaworthiness at the time of sailing. But if other facts as to the seaworthiness of the ship were proved they must be weighed against the unaccountable loss of the ship so soon after sailing, and unless the balance of the evidence warranted the conclusion that the ship was unseaworthy when she sailed, such unseaworthiness could not be treated as established and the defence founded on it failed. (7) In *Barnabas* v. *Bersham Colliery Co.* (8),

(1) (1868) L. R. 2 P. C. 317.
(2) [1891] 2 Q. B. 11, at p. 15.
(3) (1837) 8 C. & P. 207, at p. 212.
(4) (1795) 1 Esp. 315.
(5) 3 H. & C. 596.
(6) [1901] A. C. 362.
(7) Ibid. at p. 366.
(8) (1910) 4 B. W. C. C. 119.

a case under the Workmen's Compensation Act, 1906, the House of Lords held that where the facts were equally consistent with the death of the workmen from natural causes or from an accident, the onus on the applicants for compensation of proving that the death was due to an accident had not been discharged. This is supported by the decision in *The Glendarroch* (1), and there is nothing to the contrary in *Dollar* v. *Greenfield* (2) or in *Morison, Pollexfen & Blair* v. *Walton.* (3) The defendant in the present case proved facts from which the learned judge drew the inference that the loss was caused by the barge being mud-sucked, and if the bargeman had been there he could not have done anything to avoid the effect of the mudsucking. This Court will not interfere with the finding of fact by the learned judge who heard the witnesses. The defendant has therefore actually shown that the loss was not caused by his negligence, or at any rate he has shown a state of things under which it is doubtful whether the loss was caused by his negligence, and upon the whole of the evidence the plaintiffs have not discharged the onus which lay upon them of showing that the loss was caused by the defendant's negligence.

Next, if the loss was caused by the defendant's negligence, the defendant is protected by the terms of the contract relieving him from liability "for any damage to goods however caused which can be covered by insurance." It is a question of fact whether the defendant is a common carrier or undertook the liability of a common carrier: *Tamvaco* v. *Timothy* (4); and it has not been found here by the learned judge that the defendant is a common carrier or undertook the liability of one. Apart from the absence of any such finding, the defendant occupies exactly the same position as was occupied by the defendants in *Chattock* v. *Bellamy* (5) and *Consolidated Tea and Lands Co.* v. *Oliver's Wharf* (6), where Charles J. in the first case and Hamilton J. in the second held that the defendants had not undertaken the liability of common carriers and were therefore only liable for negligence, distinguishing the case of *Liver Alkali*

(1) [1894] P. 226.
(2) *The Times*, May 19, 1905.
(3) Unreported, May 10, 1909.
(4) (1882) Cab. & E. 1.
(5) (1895) 64 L. J. (Q.B.) 250.
(6) [1910] 2 K. B. 395.

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Co. v. *Johnson* (1) upon the ground that the defendant there held himself out to carry goods for all persons. Apart therefore from the exemption clause the defendant is only liable for negligence. The exemption clause relieves him from liability for loss caused by negligence. The words are "however caused," and they include a loss caused by the negligence of the defendant. In *Price* v. *Union Lighterage Co.* (2) those words were not in the exemption clause. The words were "for any loss of or damage to goods which can be covered by insurance," and it was held that they did not cover a loss caused by the negligence of the defendant's servants. Those words have no reference to causation. That case was followed in *The Pearlmoor.* (3) The words "however caused" have been considered in several cases and their meaning has become crystallized. In *Austin* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (4), in *Austin* v. *Same* (No. 2) (5), and in *Great Northern Ry. Co.* v. *Morville* (6) the words were held to exempt the defendants from liability for negligence. In *Peek* v. *North Staffordshire Ry. Co.* (7), a case which was decided on s. 7 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), the words of the condition exempting the defendants from liability were construed as meaning "however caused" and were held to include negligence. In *Taubman* v. *Pacific Steam Navigation Co.* (8) the words of exemption were "under any circumstances whatsoever," and they were held to include loss through negligence. So also the words "in any case" were held to cover loss by negligence: *Ashendon* v. *London, Brighton and South Coast Ry. Co.* (9); and in *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Brown* (10) the words "from whatever other cause arising" were held to mean "however caused" and to cover negligence. In *The Stella* (11) it does not appear to have been

(1) (1872) L. R. 7 Ex. 267; (1874) 9 Ex. 338.
(2) [1903] 1 K. B. 750; [1904] 1 K. B. 412.
(3) [1904] P. 286.
(4) (1851) 16 Q. B. 600; 20 L. J. (Q.B.) 440.
(5) (1852) 10 C. B. 454; 21 L. J. (C.P.) 179.
(6) (1852) 21 L. J. (Q.B.) 319.
(7) (1863) 10 H. L. C. 473, at pp. 567, 577.
(8) (1872) 1 Asp. M. L. C. 336.
(9) (1880) 5 Ex. D. 190.
(10) (1883) 8 App. Cas. 703, at p. 710.
(11) [1900] P. 161.

disputed that the words "however caused" would cover a loss by negligence. The latest case on the subject is *Pyman Steamship Co.* v. *Hull and Barnsley Ry. Co.* (1) Bailhache J. held that the words "howsoever arising" were capable of only one construction and covered negligence. The defendant is therefore protected by the exemption. [*Sutcliffe* v. *Great Western Ry. Co.* (2) was also referred to.]

Leck, K.C., in reply. With regard to the contention that the exemption clause protects the defendant from liability even though the loss was caused by his negligence, the words of exemption here are not distinguishable from those in *Price* v. *Union Lighterage Co.* (3) Both in that case and in this the exemption clause deals with a limited class of risks, namely, insurance risks. As Walton J. said in his judgment in *Price's Case* (4), which was approved in the Court of Appeal, the exemption must be construed as limiting the liability of the carrier as insurer, and not as relieving him from the duty of exercising reasonable skill and care in the conveyance. In *Sutton* v. *Ciceri* (5) it was held that an exemption of "insurance risks" did not discharge the defendants from the ordinary liability of a carrier to use due care in the carriage of the goods. The railway cases stand upon a separate footing. In none of them was there an exemption in terms of risks which could be covered by insurance. For instance, the exemption clause in *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Brown* (6) was as wide as possible, and the Court was dealing with an exemption, not of a particular class of risks, but of all risks. The decisions in *Taubman* v. *Pacific Steam Navigation Co.* (7) and *The Stella* (8), in which latter case the question was not argued, cannot stand beside the later case of *Price* v. *Union Lighterage Co.* (3) In this latter case the words were in terms as wide as possible and included every risk, because every risk can be covered by insurance. The words "however caused" do not add anything to the risks covered by the clause. The exemption clause in the present

(1) [1914] 2 K. B. 788.
(2) [1910] 1 K. B. 478.
(3) [1903] 1 K. B. 750; [1904] 1 K. B. 412.
(4) [1903] 1 K. B. at p. 754.
(5) (1890) 15 App Cas. 144.
(6) 8 App. Cas. 703.
(7) 1 Asp. M. L. C. 336.
(8) [1900] P. 161.

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case comes within the decision in *Price* v. *Union Lighterage Co.* (1), and the defendant is not relieved from liability for negligence. In *Consolidated Tea and Lands Co.* v. *Oliver's Wharf* (2) the only question was whether the defendants were liable as common carriers.

[PHILLIMORE L.J. referred to *Haigh* v. *Royal Mail Steam Packet Co.* (3), where the case of *Thompson* v. *Royal Mail Steam Packet Co.* (4) is cited.]

The exemption clause there was not limited by reference to insurance. In *Nelson & Sons* v. *Nelson Line* (5) the Court of Appeal, following the decision in *Price* v. *Union Lighterage Co.* (1), held that the words "damage or detriment to the goods which is capable of being covered by insurance or which has been wholly or in part paid for by insurance" did not exempt the defendants from liability for damage arising from the neglect of their implied obligation to supply a seaworthy ship. That decision was affirmed in the House of Lords (6) upon the ground that the document was so contradictory and ambiguous that it could not be said to contain a clear exemption from liability, but nothing was said affecting the decision of the Court of Appeal.

Cur. adv. vult.

July 31. BUCKLEY L.J. read the following judgment:—In this action the plaintiffs sue for damages sustained by the defendant's negligence in relation to the lighterage of goods by the lighter *Mabel*. The lighter was lying at night at the Aberdeen Wharf. The defendant left her unattended. The tide fell so that she took the ground; when the tide rose again she was was either underpinned or mudsucked and failed to rise; the water got in, the barge was submerged, and the goods were damaged. The defendant was guilty of negligence in leaving her unattended, but he says that, assuming negligence and assuming that the negligence caused the loss, he is not liable by reason of certain words in the contract. These words are:

(1) [1903] 1 K. B. 750; [1904] 1 K. B. 412.
(2) [1910] 2 K. B. 395.
(3) (1883) 52 L. J. (Q.B.) 640; 5 Asp. M. L. C. 189.
(4) (1875) 5 Asp. M. L. C. 190, n.
(5) [1907] 1 K. B. 769.
(6) [1908] A. C. 16.

"The rates charged by me for lighterage are for conveyance only. I will not be responsible for any damage to goods however caused which can be covered by insurance."

Before coming to any authorities let me examine these words and see what they import. It is not every loss which is excluded by the words in question. The losses are confined to "any damage which can be covered by insurance." This infers that there may be losses which cannot be covered by insurance. It may be that practically every loss can be covered by insurance, but this document evidently contemplates that within its meaning some cannot. The clause of immunity therefore is confined to certain losses, namely, losses which can be covered by insurance.

The next step is to consider what are the losses or damages which this contractor would be under if he were not protected against them. For it is to such that the words must be addressed. For this purpose it is necessary to ascertain what the defendant's business was. Was he a common carrier, or was he a person who came under the same liability as if he were a common carrier? It seems to me unnecessary to consider whether this defendant was a common carrier. If he has undertaken the liability of a common carrier he stands in the same position as regards liability. The question whether he has undertaken such liability or not is, according to *Tamvaco* v. *Timothy* (1), one of fact. He was a person who did not hold himself out as ready to carry goods for every one, but he did, I think, hold himself out as a person ready to carry goods for reward for any one who resorted to his wharf as a customer of himself as a wharfinger. All his bill-heads and stationery were headed with these words: "The rates charged by me for lighterage are for conveyance only. I will not be responsible for any damage to goods however caused which can be covered by insurance. Merchants are advised to see that their policies cover risk of craft and are made without recourse to lighterman." According to *Liver Alkali Co.* v. *Johnson* (2) such a person may incur the liability of a common carrier. As a lighterman he was, I think, a person who incurred the liability of a common carrier in respect of the goods he

(1) Cab. & E. 1. (2) L. R. 7 Ex. 267; 9 Ex. 338.

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carried. *Chattock* v. *Bellamy* (1) and *Consolidated Tea and Lands Co.* v. *Oliver's Wharf* (2) are no doubt cases in which the question of fact was resolved the other way. In the last-mentioned case Hamilton J. thought that the wharfinger only occasionally rendered to the customer of the wharf the subsidiary service of collecting and carrying his goods from the import steamer, and on that ground held that he was not subject to the liability of a common carrier. The question is one of fact, and looking at the business in the present case it is to be resolved, I think, in favour of holding that the defendant undertook the liability of a common carrier. This being so, the defendant's liability was not confined to the liability to take proper care of the goods and not to be negligent, but extended to a liability to carry the goods safe against all events except the act of God and the King's enemies. He was therefore under two liabilities, the one a liability for negligence, and the other a liability, as it is commonly expressed, as an insurer. His position is similar to that of the shipowner who is under two liabilities, the one as insurer arising from the fact that he is a carrier, and the latter a liability arising from the implied warranty of seaworthiness. This was much discussed recently in *Ingram & Royle* v. *Services Maritimes du Tréport.* (3) In this position of affairs an intelligible meaning is at once given to the words of exemption "damage which can be covered by insurance." To the extent of his liability as insurer the contract relieved him from liability, but the contract leaves him liable for negligence.

In this state of things the decision in *Price* v. *Union Lighterage Co.* (4) is, I think, exactly in point. That decision may be summarized by saying that the contract is to be read as if it contained the words "I will use reasonable care and skill and will be liable for negligence, but as to losses which can be covered by insurance, and for which, but for contract to the contrary, I should be responsible to you as insurer, I am not to be liable for those. If you want to provide for them you must cover them by insurance." If the carrier, says Walton J. (5),

(1) 64 L. J. (Q.B.) 250.
(2) [1910] 2 K. B. 395.
(3) [1914] 1 K. B. 541.
(4) [1903] 1 K. B. 750; [1904] 1 K. B. 412.
(5) [1903] 1 K. B. at p. 752.

desires to exempt himself, he must do so in express, plain and unambiguous terms. The parties are to be taken as contracting with reference to losses which are the common misfortune of both to the exclusion of losses which are due to the fault of one unless the contrary be so expressed. The decision in that case was approved and followed in *Nelson & Sons* v. *Nelson Line* (1), where Lord Collins (2) pointed to the same consideration as I have mentioned with reference to the use of the word insurance. Again, in *Sutton* v. *Ciceri* (3) Lord Herschell deals in the same way with the words "insurance risks," as to which he says that where spoken of in contradistinction to freight the words cannot have so extensive a meaning as to exempt the party from liability as an ordinary carrier. *The Pearlmoor* (4) is to the same effect.

We have, however, been referred to cases earlier in date than *Price* v. *Union Lighterage Co.* (5), in which a larger exemption has been allowed in cases in which there have occurred words such as "in any case," or "under any circumstances," or "however caused," words which did not occur in *Price* v. *Union Lighterage Co.* (5) They are mostly railway cases. The first, in 1851, *Austin* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (6), is not, I think, of general application. In that case the owner of the horses accepted under the contract an obligation to see to the efficiency of the carriage before he allowed his horses to be placed therein. There was a special contract in the matter again in a second action between the same parties. (7) In *Great Northern Ry. Co.* v. *Morville* (8) the words were "for any damages however caused," but again the contract contained the terms of a special agreement in the matter. In *Taubman* v. *Pacific Steam Navigation Co.* (9) the words were "under any circumstances whatsoever." It was held that this covered a case of wilful default and misfeasance. In *The Stella* (10) the words

(1) [1907] 1 K. B. 769; [1908] A. C. 16.
(2) [1907] 1 K. B. at pp. 777, 778.
(3) 15 App. Cas. 144, at p. 152.
(4) [1904] P. 286.
(5) [1903] 1 K. B. 750; [1904] 1 K. B. 412.
(6) 16 Q. B. 600; 20 L. J. (Q.B.) 440.
(7) 10 C. B. 454; 21 L. J. (C.P.) 179.
(8) 21 L. J. (Q.B.) 319.
(9) 1 Asp. M. L. C. 336.
(10) [1900] P. 161.

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were "however caused." At p. 168 Gorell Barnes J. says the condition "is clearly one which exonerates the company from liability for the accident in this case." But the point does not seem to have been argued. I doubt whether the decisions in *Taubman* v. *Pacific Steam Navigation Co.* (1) and *The Stella* (2) can stand with the decision in *Price* v. *Union Lighterage Co.* (3) The case which creates most difficulty is that of *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Brown.* (4) The words there were "liability for loss or damage by delay in transit or from whatever other cause arising." These were the words contained in the offer as made by the company. The document signed by Brown ran "free and relieve the railway companies from all claim or liability for loss or damage," not adding "from whatever other cause arising." But the case proceeded upon the footing that the words in the offer and not the more limited words in the acceptance were the words to be considered. The language of Lord Blackburn (5) is this: "Custom and ordinary usage says, in bills of lading when the goods are going by sea, 'perils of the seas excepted.' Well, the carrier is free as regards them. No one could for a moment argue that if the shipowner's servants negligently ran upon a rock, or negligently had a collision with another vessel, the owner of the goods carried in his ship would not be entitled to say, 'I will bring an action against you for this negligent collision which has done me harm, even though you are not to be made responsible, as an insurer, for a peril of the sea, which is an excepted means of damage.' And so of leakage, and many other things of that sort. But that does not in the slightest degree shew that, when a man says he will not be responsible for damage however caused, that is to be cut down and made, contrary to the intention of the parties, not to include the negligence of his servants." These words, it will be noticed, contrast the liability as an insurer with the liability for negligence, and contrast them in a case in which there was not, as in the present case, a limited class of loss contemplated by the

(1) 1 Asp. M. L. C. 336.
(2) [1900] P. 161.
(3) [1903] 1 K. B. 750; [1904] 1 K. B. 412.
(4) 10 Q. B. D. 250; 8 App. Cas. 703.
(5) 8 App. Cas. at pp. 709, 710.

exemption clause in question. Had the words been as in the present case, "I will not be responsible for insurance risks," inferring "I will be responsible for other risks," Lord Blackburn's words would not, I think, apply. It is moreover to be borne in mind, as regards the railway cases, that they are cases in which a company enjoying a monopoly, but compellable to carry and covered by such a provision as is contained in s. 7 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), is the defendant in an action. The effect of s. 7 is that the company is liable for negligence, notwithstanding notice to the contrary, subject to a proviso that the company may make such conditions as the Court shall find to be just and reasonable. Negligence therefore is within the subject-matter dealt with, and a condition which is found to be just and reasonable may possibly be imposed even in the matter of negligence. The railway cases are to be treated, I think, as being a class of their own.

The conclusion at which I arrive with regard to this clause is that it relieves the defendant from liability for loss falling within a certain class, and that the class is that of insurance risks in the ordinary meaning of that word as distinguished from liability for negligence. For these reasons I think that the defendant is not protected by the clause in question.

There arises, therefore, the question whether the plaintiffs have proved their case. They have proved negligence, but the learned judge has held that they fail because they have not proved that the negligence caused the loss. If the learned judge had enjoyed the assistance which we have of the decision of the House of Lords in *Morison, Pollexfen & Blair* v. *Walton* (1), decided on May 10, 1909, I doubt whether he would have decided this point as he did. The language of Lord Loreburn in that case seems to me to be directly in point. It was a case in which a firefloat, which was being towed, was lost, and the reason why she sank was unknown because there was no one on board her as there ought to have been. Lord Loreburn said: "Here is a bailee who, in violation of his contract, omits an important precaution, found by the learned judge upon ample evidence to be necessary for the safety of the thing bailed to him and which

(1) Not reported.

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might have prevented the loss. And his breach of contract has the additional effect of making it impossible to ascertain with precision and difficult to discover at all what was the true cause of the loss. I cannot think it is good law that in such circumstances he should be permitted to saddle upon the parties who have not broken their contract the duty of explaining how things went wrong. It is for him to explain the loss himself, and if he cannot satisfy the Court that it occurred from some cause independent of his own wrong-doing he must make that loss good." And Lord Halsbury said: "It appears to me that here there was a bailment made to a particular person, a bailment for hire and reward, and the bailee was bound to shew that he took reasonable and proper care for the due security and proper delivery of that bailment; the proof of that rested upon him." That is, I think, precisely applicable to the present case. Upon the evidence there is the greatest difficulty in saying what happened, whether the barge was underpinned or whether she was mudsucked. The learned judge thought that the evidence was more consistent with the latter than the former and said: "I come to the conclusion that the evidence leads me to say that this arose from mudsucking, and not from being underpinned." But, having to choose between two theories, the judge said no more than that he was led to the one rather than to the other. What did take place it was impossible to prove, and the impossibility arose from the fact that the defendant neglected his obligation to keep a man in charge. The defendant as bailee of the goods is responsible for their return to their owner. If he failed to return them it rested upon him to prove that he did take reasonable and proper care of the goods, and that if he had been there he could have done nothing, and that the loss would still have resulted. He has not discharged himself of that onus. *Phipps* v. *New Claridge's Hotel* (1) and *Scott* v. *London and St. Katherine Docks Co.* (2) are in point, except that the question there was whether there was negligence or not, not whether the negligence caused the loss, and *Barnabas* v. *Bersham Colliery Co.* (3) contains, I think, nothing to the contrary.

(1) 22 Times L. R. 49. (2) 3 H. & C. 596.
(3) 4 B. W. C. C. 119.

Lord Loreburn, who gave judgment in the last-mentioned case, is the learned Lord from whom I have already cited in *Morison, Pollexfen & Blair* v. *Walton*. Upon this ground I think that the decision under appeal should be reversed, and judgment given for the plaintiffs.

KENNEDY L.J. read the following judgment:—In this case there is no doubt that the defendant's servant, who ought to have been in attendance upon the lighter during the night in the course of which, through some cause or other, it became submerged with the valuable cargo of the plaintiffs on board, improperly absented himself, and that through this misconduct the defendant must be held guilty of negligence in regard to the property of the plaintiffs of which the defendant was bailee. Pickford J. (as he then was) has so found, and upon the hearing of this appeal the defendant's counsel did not dispute the propriety of this finding of fact. The learned judge, notwithstanding, gave judgment for the defendant, because he held that it was not proved by the plaintiffs that the submersion of the lighter with her cargo was attributable to this negligence. Two causes of submersion were suggested, "mudsucking" and "underpinning." There were, said the learned judge, "the greatest possible difficulties" in preferring one of these theories to the other, but he came to the conclusion that the difficulties in the way in regard to underpinning were greater than those which were involved in the "mudsucking" solution. Thereupon, if it be assumed that the cause of the submersion was "mudsucking," came the further question, Might the submersion have been prevented if the defendant's lighterman had not absented himself? The learned judge held that it was not proved to him that if the defendant's servant had been there he could have prevented the accident; and therefore, although, as he says, he did not like to free the defendant from the consequence of what he thought was negligence, he came to the conclusion that it was not shown that the defendant's negligence was the cause of the accident. It is clear that the propriety of this result depends upon a view as to the burden of proof that in such a case that burden lies upon the plaintiff. "Mr. Leck

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argued," said the learned judge, "that, once I find negligence, it is for the defendant to prove conclusively . . . . that the man could not have done anything to free the barge. I do not think that is the right point of view. I think that in this case, just as in any other, it is for the plaintiffs to prove that the negligence which occurred was the cause of the accident . . . . I have no evidence before me at all to lead me to conclude that if the man had been there he could have obtained any assistance of that kind, and therefore, as I say with some regret, because I do not like to free the defendant from the consequence of what I think was negligence, I come to the conclusion that it is not shewn that that negligence was the cause of the accident." With due deference, I must say that I am unable to concur in this treatment of the burden of proof in such circumstances. I agree with Mr. Leck that the burden of disproof rested upon the defendant. We have properly been referred by the plaintiffs' counsel to the opinions expressed in the House of Lords by Lord Loreburn L.C. and Lord Halsbury in the unreported case of *Morison, Pollexfen & Blair* v. *Walton*, decided on May 10, 1909. A copy of the shorthand notes of the proceedings has been supplied to us. There, as here, the claim was by a bailor against a bailee. "Here is a bailee," said Lord Loreburn, "who, in violation of his contract, omits an important precaution, found by the learned judge upon ample evidence to be necessary for the safety of the thing bailed to him, and which might have prevented the loss. And his breach of contract has the additional effect of making it impossible to ascertain with precision, and difficult to discover at all, what was the true cause of the loss. I cannot think it is good law that in such circumstances he should be permitted to saddle upon the parties who have not broken their contract the duty of explaining how things went wrong. It is for him to explain the loss himself, and if he cannot satisfy the Court that it occurred from some cause independent of his own wrong-doing he must make that loss good." And so Lord Halsbury: "It appears to me that here there was a bailment made to a particular person, a bailment for hire and reward, and the bailee was bound to shew that he took reasonable and proper care for the due security and

proper delivery of that bailment; the proof of that rested upon him."

If the decision in this appeal depended simply upon this question of the burden of proof, this Court would have to consider whether it could properly, upon the evidence already taken, give judgment for the plaintiffs, or should order a new trial. But, independently and outside of it, there is an important question of law in regard to the terms of the contract of carriage, which the defendant's counsel have very fully argued in this Court, as they were entitled to do, although it is clear that it was not much discussed before my brother Pickford in the Court below. He states the view which he was inclined to prefer, but he did not give any definite judgment upon the point. The defendant relies upon a certain condition in the contract as exonerating him from liability for negligence. The learned judge, whilst, as I have said, expressly stating that it was unnecessary for him to decide it, because he held it was not proved that the defendant's negligence caused the loss and damage sued for, stated also, adversely to the defendant, that if he had to decide the point his inclination would be to hold that the condition in the contract did not cover the defendant, and did not protect him from liability.

This point of contractual liability arises in the following way. The defendant, who is a warehouseman, also undertakes for reward lighterage for his customers. He performs this lighterage sometimes in barges of his own and sometimes in hired barges. He undertook such lighterage in the case of the plaintiffs' goods on this occasion upon the terms of a written notice in the following words: "The rates charged by me for lighterage are for conveyance only. I will not be responsible for any damage to goods however caused which can be covered by insurance. Merchants are advised to see that their policies cover risk of craft and are made without recourse to lighterman." The question is whether the terms of this condition are such as to protect the defendant from liability for the loss of or damage to the plaintiffs' goods, if such loss or damage was caused by the negligence of the defendant's servant in charge of the lighter and of the plaintiffs' goods on board of it.

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In dealing with this question it is not necessary to decide whether, apart from the special condition, the liability of the defendant as a lighterman would or would not have been analogous to that of a common carrier, according to the doctrine laid down by the Exchequer Chamber in 1874 in the case of *Liver Alkali Co.* v. *Johnson.* (1) I incline to think that it was. The decision of Hamilton J. (as he then was) in *Consolidated Tea and Lands Co.* v. *Oliver's Wharf* (2), which was cited to us in support of a different view, may, I think, be distinguished on the facts. The warehousing firm in that case owned no lighters, and, whilst in some cases conveying a customer's goods in a hired lighter from ship to wharf, made no charge for that, but had a uniform rate, called a management rate, from which no abatement was made in cases in which the customer did his own lightering. In the present case the defendant, though it appears from the evidence that he lighters only for customers who employ his services as a warehouseman, also appears from the terms of the notice which I have quoted to undertake lighterage and to make a charge for that particular service. In the absence of an express contract between the parties, the measure of the liability of a warehouseman who undertakes the lighterage of a customer's goods must, I think, depend upon the inference to be drawn from the particular facts in each case. In the case of *Tamvaco* v. *Timothy* (3), in the year 1882, tried before Cave J. sitting with a London special jury in the Guildhall, the facts were that the defendants, who were wharfingers on the Thames, carried in a lighter for the plaintiffs, their customers, certain rice in a barge, which stuck in the mud, whereby the rice was injured. They made one common charge for carrying and warehousing. Cave J. left the question of the terms of the contract of carriage, which were not the subject of any express agreement but had to be inferred from these arrangements, to the jury, and they, after hearing the matter argued by very eminent counsel, found by their verdict that it was understood between the plaintiffs and the defendants when the agreement was made as to these goods that the defendants should undertake the

(1) L. R. 9 Ex. 338. (2) [1910] 2 K. B. 395.
(3) Cab. & E. 1.

liability of common carriers. In the present case, whether he had the larger liability of a common carrier or not, there can be no doubt that the defendant had at least the duty not to be negligent in regard to the carriage of the goods in his lighter, and he was negligent. Is he protected by the terms of the special contract from the consequences of that negligence to the owner of the goods? But for the words "however caused" I am of opinion that he would not be, and that the decision of this Court in *Price* v. *Union Lighterage Co.* (1), affirming the judgment of Walton J. (2), which is referred to by Pickford J. in his judgment in the present case, would bind us so to hold. In that case, however, there were no such words as "however caused." The contract of carriage exempted from liability only "for any loss of or damage to goods which can be covered by insurance." There were no words referring to causation. Mr. Roche, in his full and able argument, has satisfied me that the presence of such words creates an essential difference; and that, whilst it is settled law that a contractual exemption, whether from loss or damage generally or from certain enumerated forms of loss or damage (such, e.g., as collisions, stranding, and other perils), will not be read as protecting the carrier from liability for loss or damage if the loss or damage is proved to arise from the carrier's negligence, and words "for any loss of or damage to goods which can be covered by insurance" do not operate to enlarge the exemption, as appears from the case to which I have just referred, a different position in regard to the carrier's liability is created if the exemption clause is so worded as, according to the natural and plain interpretation of its language, clearly to comprehend all loss or damage, however that loss or damage may originate. The general principle was laid down by Lord Blackburn in *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Brown* (3): "When an exception is made, the question is, What is excepted? Custom and ordinary usage says, in bills of lading when the goods are going by sea, 'perils of the seas excepted.' Well, the carrier is free as regards them. No one could for a moment argue that if the shipowner's

(1) [1904] 1 K. B. 412.
(2) [1903] 1 K. B. 750.
(3) 8 App. Cas. 703, at pp. 709, 710.

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servants negligently ran upon a rock, or negligently had a collision with another vessel, the owner of the goods carried in his ship would not be entitled to say, 'I will bring an action against you for this negligent collision which has done me harm, even though you are not to be made responsible, as an insurer, for a peril of the sea, which is an excepted means of damage.' And so of leakage, and many other things of that sort. But that does not in the slightest degree shew that when a man says he will not be responsible for damage however caused, that is to be cut down and made, contrary to the intention of the parties, not to include the negligence of his servants."

So a protective effect against the consequences of the carrier's negligence has been given to an exemption clause in 1872, in *Taubman* v. *Pacific Steam Navigation Co.* (1), where the words were "under any circumstances whatsoever"; in 1875, in *Thompson* v. *Royal Mail Steam Packet Co.* (2), where the words were "in any circumstances"; in 1883, in *Haigh* v. *Royal Mail Steam Packet Co.* (3), "under any circumstances"; in *The Stella* (4), where the words were "any injury however caused"; and quite recently by Bailhache J. in *Pyman Steamship Co.* v. *Hull and Barnsley Ry. Co.* (5), where the words were "whatever may be the nature of such accident or damage or howsoever arising."

In the present case, the condition which we have to consider uses the very words of exemption referred to by Lord Blackburn in *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Brown* (6), "damage however caused"; and I see no sufficient reason not to treat them as sufficient to protect the defendant from liability for the negligence of his servant in regard to the carriage of the plaintiffs' goods.

On this ground, therefore, whilst, for the reasons which I have stated, I respectfully differ from my brother Pickford in regard to the view which he has taken as to the burden of proof upon the question of negligence, I think that in the result the

(1) 1 Asp. M. L. C. 336.
(2) 5 Asp. M. L. C. 190, n.
(3) 52 L. J. (Q.B.) 640; 5 Asp. M. L. C. 189.
(4) [1900] P. 161.
(5) [1914] 2 K. B. 788.
(6) 8 App. Cas. at p. 710.

defendant is entitled to retain the judgment in his favour, and that this appeal should be dismissed.

PHILLIMORE L.J. read the following judgment:—The plaintiff company was the owner of a cargo of tinned salmon in cases which was shipped on board the defendant's lighter, and which was damaged owing to the submergence of the lighter on a rising tide in the river Thames off Aberdeen Wharf about midnight between January 9 and 10, 1913. The lighter was in charge of a lighterman who was absent from his post for a period beginning at 8.45 or 9 P.M. till about 12.30 A.M., by which time the mischief had been done. This absence was without justification, and has been rightly found by the learned judge who tried the case, Pickford J. (now Pickford L.J.), to have been an act of negligence.

According to the terms of the contract of carriage the defendant was not liable as an insurer, but he may be liable for the negligence of his servants. The first question therefore to be determined is whether the loss can be imputed to the negligent absence of the lighterman from his post.

It was low water at 10.27 P.M., and the barge in the ordinary course took the ground some time before low water. As the tide made she did not rise with it, and the water flowed over her and the cargo was spoilt. It was common ground that the inability of the barge to rise with the tide must have been due to one of two causes. Either the round of her quarter was caught under a horizontal beam which ran along the face of the wharf and so pinned down, or the barge was held by the suction of the mud. Either of these causes was possible, but the circumstances made both improbable, and it was very difficult to choose between them. If the cause was the underpinning it seems clear that the negligent absence of the lighterman was an important factor of the loss. If the awkward position of the barge, no longer true with the side of the wharf but so swung that her counter was under the beam, was a position taken by the barge before she grounded, the leaving her to rise in a similar position without attendance, without the lighterman being there to use such means as he could or to procure additional assistance if desirable, would

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be a gross act of negligence. Putting the matter in a way to press less hardly on the lighterman, and assuming that the barge took the ground in a line parallel with the wharf, then if he had been on board or on the wharf as she rose, and had seen her, owing to some action of the current, beginning to swing under the beam, he could by the use of a hitcher, or by pulling on or slackening the ropes with or without assistance which could have been obtained, have prevented her getting into danger or could have easily freed her.

If the loss was due to suction, it is not so clear that the personal attendance of the lighterman could have prevented it, but it is not by any means impossible. If the loss was due to suction it is a necessary part of the defendant's case that the barge took the ground as she was found when she was raised, i.e., lying with her head out from the wharf about ten feet, her stern out five or six feet.

If the lighterman was, as he says, there when she took the ground, and, as he says, noticed her position so that he could not get on board her from the wharf, that of itself was some warning. If she was to be tended at all, he would require to be put on board her either by a boat or by the tug which was to tow her away between 1 and 2 in the morning. If he had been there, it is possible that he, either by himself or with help, might have let in air and taken away the force of suction by the use of a hitcher or hitchers put under the barge; or the tug might have been fetched earlier; or possibly some jerk applied to the mooring ropes by him with or without help might have freed the barge from the suction.

If the burden was on the defendant of showing that the negligent absence of the lighterman could not have been a cause of the loss, he did not discharge it, even supposing that the more favourable view of the circumstances is taken, namely, that the loss was due to suction instead of underpinning.

Pickford J. seems to have thought that the burden of proving that the negligent absence of the lighterman was a cause of the loss lay upon the plaintiff company. Taking the two causes of loss, he was inclined upon the whole to think that suction was the more probable one. Taking the evidence as it is before

us on paper, I should rather incline to the other view, but so much depends upon the way in which it came out that I should not be disposed to put my view in this respect against his. But I think we may fairly say that there is no certainty and even no high degree of probability that one view is more likely than the other, and that upon whichever of the two parties the burden lies of showing which was the cause, that party has not discharged it.

If, however, as the defendant contends, we were to assume suction as the cause, again it is not certain whether or not the presence of the lighterman would have prevented the loss. Pickford J. has held that it was not proved that the presence of the lighterman would have prevented the loss, and so holding he has given judgment for the defendant. If the test be as he has put it I should again not be prepared to disagree with him. In fact, I think it is a matter of speculation as to which nobody could pronounce with a reasonable degree of certainty. It is possible that it might, and it is possible that it might not.

And this gives rise to the question, On whom was the burden of proof? It is here that I differ from the learned judge. I think he has imposed the burden of proof on the wrong party. I think that when the bailee of goods has to admit that the goods have been damaged while in his custody and in the absence of the custodian, and it is found that the absence was improper and negligent and that that very absence makes it difficult to determine what was the cause of the damage, and the owner can suggest a probable cause which the presence of the custodian might have prevented, the burden is upon the bailee to show that it was not the negligent absence which was the cause of the damage. As was said by Lord Loreburn, when Lord Chancellor, in *Morison, Pollexfen & Blair* v. *Walton* (1), "It is for him to explain the loss himself, and if he cannot satisfy the Court that it occurred from some cause independent of his own wrong-doing he must make that loss good." I think I should have come to the same conclusion rather as a matter of business and common sense than of law if I had been unaided by this decision in the House of Lords.

(1) Not reported.

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If, therefore, there were no point upon the contract I should think that the plaintiff company was entitled to recover; but there is a point upon the contract on which provisionally Pickford J. took a view unfavourable to the defendant, but which it was unnecessary for him to determine. This now becomes of importance.

The defendant is a wharfinger as well as a lighterman, and his business as a lighterman is subordinate or ancillary to his business as a wharfinger, and he received these goods to carry them for storage at his wharf and upon terms which are contained in a printed notice appended to all his letters and invoices, of which the plaintiff company had notice and which must be deemed to form part of the contract. These terms are thus expressed: "The rates charged by me for lighterage are for conveyance only. I will not be responsible for any damage to goods however caused which can be covered by insurance. Merchants are advised to see that their policies cover risk of craft and are made without recourse to lighterman." Thereupon the question arises whether by this language he has stipulated that he shall not be liable for a loss which may be due to the negligence of his servants. The words "any damage however caused" are large enough to include a loss due to negligence; but it is said that a series of decisions have put a limited construction upon these general words.

Before proceeding to determine the question of construction it is desirable to see what would have been the defendant's position if there had been no such clause. The plaintiff company contends that without such a clause the defendant would have been in the ordinary position of a barge owner who carries by water, or at any rate on the sea or tidal waters, which is that he has the liabilities of a common carrier and is responsible for the safe delivery of the goods, being allowed to set up no excuses except those called "the act of God" and "the King's enemies." The defendant contends on the authority of *Consolidated Tea and Lands Co.* v. *Oliver's Wharf* (1) and *Chattock* v. *Bellamy* (2) that he is not under this liability. In the two cases on which he relies the circumstances were very special. In *Chattock* v.

(1) [1910] 2 K. B. 395. (2) 64 L. J. (Q.B.) 250.

Bellamy (1) there were other grounds for deciding in favour of the defendants. And it does not appear to me that either of them is a sufficient authority for the present case. The general rule is that the barge owner is liable. This was well established by *Liver Alkali Co.* v. *Johnson.* (2) If there were sufficient circumstances in either of the two cases relied upon to take the particular contract of carriage out of the general rule, there are no sufficient circumstances in this case. If it be said that the difference between the circumstances in this case and the circumstances in those cases is slight, I reply that either it is sufficient or those decisions must be wrong.

I approach, therefore, the construction of the contract from the position that without it the barge owner would be liable for all losses except those occasioned by the "act of God" and the "King's enemies," so that the clause protecting him from liability for loss is wanted for protection in other cases besides those of negligence. Thus far I am in favour of the plaintiff company. But it remains that the words are wide enough to protect from loss by negligence. There have been two lines of decision as to general words of this nature. One line is conveniently represented by the decision in *Price* v. *Union Lighterage Co.* (3), to the effect that by such an exemption in general terms not expressly relating to negligence the barge owner is not exempt from liability for a loss caused by the negligence of his servants. This is well established for the words "any loss of or damage to goods," whether with or without the words "which can be covered by insurance." On the other hand there is the decision in *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Brown* (4), where the words "all liability for loss or damage by delay in transit, or from whatever other cause arising" were held to protect the railway company from liability for the negligence of their servants in accepting for carriage fish which they could not carry in time. Lord Blackburn in that case says (at p. 709): "Such a contract as this was meant to protect, and did in effect protect, the company from the negligence of their servants." And again (at p. 710): "When a man says he will

(1) 64 L. J. (Q.B.) 250.
(2) L. R. 9 Ex. 338.
(3) [1904] 1 K. B. 412.
(4) 8 App. Cas. 703.

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not be responsible for damage however caused, that is not to be cut down and made, contrary to the intention of the parties, not to include the negligence of his servants." In the case of *The Stella* (1) the same construction was given to a pass for a journey partly by railway and partly by sea, where the words were: "The company are relieved from all responsibility for any injury, delay, loss, or damage, however caused." In that case the claim was twofold: for loss of life and for loss of luggage. An earlier decision in *Taubman* v. *Pacific Steam Navigation Co.* (2) held that a stipulation that a shipowner would not be answerable for loss of baggage "under any circumstances whatsoever" covered wilful default or misfeasance by the shipowner's servants.

How are these two lines of decision to be reconciled, and what principle is to be extracted from a comparison of them? It would be a good broad principle if one could say that, wherever the bailee has the liability of a common carrier, this clause would be satisfied by giving it the effect of relieving him from that liability, but making him still responsible for the absence of due care; while, on the other hand, where his only liability in the absence of written terms would be to take due care, then the words must be given a wider effect, on which principle the recent decision of Bailhache J. in *Pyman Steamship Co.* v. *Hull and Barnsley Ry. Co.* (3) appears to rest. But railway companies have in the absence of express contract the liability of common carriers, and yet the decision in *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Brown* (4) gives what I may call the double effect to this clause; and shipowners have the same liability, and yet in *Taubman* v. *Pacific Steam Navigation Co.* (2) and in *The Stella* (1) the clause received a similar construction. So this broad principle will not hold.

It was suggested that where the clause takes the form that the barge owner will not be responsible for any loss which can be covered by insurance, the words "covered by insurance" point to a restriction, and mean any loss which the barge owner would be liable for as an insurer. I cannot take this view. It is true

(1) [1900] P. 161.
(2) 1 Asp. M. L. C. 336.
(3) [1914] 2 K. B. 788.
(4) 8 App. Cas. 703.

that by a metaphor the carrier in the absence of special contract is called an insurer. He is not really an insurer. There is no contract of insurance; his liability omits two of the primary losses for which an ordinary underwriter makes himself liable, the act of God and the King's enemies. The word "insurer" is borrowed as a convenient word for expressing his liability. Even if it were otherwise, the expression is not "I will not be responsible for any loss or damage for which I should be liable as an insurer," but "for any loss or damage which you can cover by insurance." Now the goods owner by insuring in the ordinary way covers himself against loss by perils of the seas, howsoever caused, whether by negligence of the carrier's servants or otherwise. It seems to me that, if these words "which can be covered by insurance" are to lend any colour, they intensify the force of the words "any" and "however"; "mind you, any and every loss, however caused, against which you can protect yourself by an ordinary insurance, so that if you lose you need not come upon me for recoupment."

This then is the distinction. It is a fine one, and I am sorry to think that it is so fine; but it seems to be this. If you say "any loss" you are directing attention to the kinds of losses and not to their cause or origin, and you have not sufficiently made it plain that you mean "any and every loss" irrespective of the cause, and therefore you have not brought home to the person who is entrusting the goods to you that you are not going to be responsible for your servants on your behalf exercising due care for them, or possibly even for your own personal want of care. But if you direct attention to the causes of any loss, if you say "any loss," "however caused" or "under any circumstances," you give sufficient warning, and it is not necessary to say in express terms "whether caused by my servants' negligence," or in the bill of lading phrase, "neglect or default or otherwise." This seems to be indicated by the decision in *Haigh* v. *Royal Mail Steam Packet Co.* (1) The case itself is a decision upon a claim for loss of life and, as shipowners may be said not to have the liabilities of common carriers in respect of passengers, it may not so far be to the point. It is true also

(1) 52 L. J. (Q.B.) 640; 5 Asp. M. L. C. 189

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that the case was mainly argued upon the question whether the words "loss or damage" could be applied to human beings. But the analysis of the argument is as follows: To a claim by an executor for the loss of life of a passenger by reason of negligent navigation the defence was a clause in the ticket to the effect that the company would not be responsible "for any loss or damage arising from . . . . any act, neglect, or default whatsoever of the pilot, master or mariners." To this it was replied that these were not apt words to cover loss of life. The defendant company rejoined that they could have no other meaning, for loss of luggage was covered by an earlier clause, namely, "The company will not be responsible for any loss, damage, or detention of luggage under any circumstances." To this the plaintiff surrejoined, as it were, that these words were not large enough to cover loss or damage by any act, neglect, or default of servants. The Court of Appeal held that they were large enough, and that therefore the company was already protected against loss of luggage even by negligence, and that accordingly the words in the later clause must apply to loss of life or they would have no application. Further, the Court gave its approval to the decision of the Court of Exchequer in an action by one Thompson against the same company (1) and dwelt upon the circumstance that the words "any loss" in an earlier form of the same company's ticket had been held to be insufficient, but the addition of the words "under any circumstances" made it sufficient.

This is a direct approval of the view that if the clause directs attention to the cause of loss and excludes all causes it gives sufficient protection. I think this must be our guiding line, and that the judgment for the defendant was therefore right, and this appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *William A. Crump & Son.*
Solicitors for defendant: *Keene, Marsland, Bryden & Besant.*

(1) 5 Asp. M. L. C. 190, n.

W. F. B.

WHITE BROTHERS *v.* SOUTH STONEHAM UNION ASSESSMENT COMMITTEE.

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Oct. 13.

Rates—Poor Rate—Rateable Value—Expense necessary to command Rent—Dredging Tidal River outside Shipbuilding Yard—Parochial Assessments Act, 1836 (6 & 7 *Will.* 4, *c.* 96), *s.* 1.

Premises adjoining a tidal navigable river were used as a shipbuilding yard. The business of the occupiers required that yachts and boats should have access from the river to their wharves and jetties, and to maintain this access they incurred an annual expenditure in dredging the river outside the premises in their own occupation :—

Held, that the amount paid for this dredging was not, within s. 1 of the Parochial Assessments Act, 1836, an expense necessary to maintain the hereditaments in a state to command the rent, and, therefore, did not form a proper deduction from the gross estimated rental of the hereditaments in ascertaining the net rateable value thereof.

Special Case stated by Southampton Quarter Sessions.

White Brothers appealed to quarter sessions against a rate or assessment for the relief of the poor of the parish of Itchen, in the county of Southampton. In the rate White Brothers were rated as the occupiers of certain property described therein as follows :—

	Gross estimated rental.	Rateable value.
Shipbuilding yard, workshop, wharves, jetties and offices	£750	£500

The grounds of appeal were (*a*) that White Brothers were overrated in respect of the rateable value of the property; (*b*) that a sufficient deduction had not been made from the gross estimated rental of the property in order to arrive at the rateable value thereof.

White Brothers' premises adjoined the Itchen, a tidal navigable river, and their business required that yachts and boats should have access from the river to their wharves and jetties. In order to maintain this access White Brothers had incurred an annual expenditure in dredging the river outside the premises in their own occupation, and quarter sessions, upon hearing the evidence, determined the annual average of the expenditure on such dredging to be 50*l.*

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The gross estimated rental of the premises, which was fixed at 750*l.*, was not appealed against, and quarter sessions found that in determining the rateable value the assessment committee had made the proper deductions, except in regard to the outside dredging as aforesaid.

For White Brothers it was contended that this dredging was an expense necessary to maintain the hereditaments in a state to command the rent, but the assessment committee had not allowed any such deduction.

For the assessment committee it was contended that such dredging was not an expense which was necessary to maintain the hereditaments in a state to command the rent, but was carried out by the tenants in order to enable them to earn profits in their business.

The quarter sessions, having heard arguments and the evidence of witnesses on each side, were of opinion that the expenses of such outside dredging were expenses necessary to maintain the hereditaments in a state to command the rent within s. 1 of the Parochial Assessments Act, 1836 (1), and accordingly they allowed the appeal, and reduced the rateable value from 500*l.* to 450*l.*, the difference being the sum which they found to be the average annual cost of the said dredging.

The question for the opinion of the Court was whether the expenses of the said dredging formed a proper deduction from the gross estimated rental of the hereditaments in ascertaining the net rateable value thereof.

Foote, K.C. (*Charles*, K.C., with him), for the assessment committee. The quarter sessions were wrong in holding that

(1) Parochial Assessments Act, 1836 (6 & 7 Will. 4, c. 96), s. 1: "... No rate for the relief of the poor in England and Wales shall be allowed by any justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rent charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent ..."

the expense of dredging the Itchen outside the rateable hereditaments was an expense to be deducted from the gross estimated rental in arriving at the net rateable value. It has never been held that expenditure on something outside the premises in question can come within the words of s. 1 of the Parochial Assessments Act, 1836.

English Harrison, K.C. (*S. H. Emanuel* with him), for White Brothers. The question is one of fact—see per the Earl of Halsbury L.C. in *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee* (1)—and that question of fact has been disposed of by quarter sessions. By s. 1 of the Act of 1836 the rate is to be made "upon an estimate of the net annual value of the several hereditaments rated thereunto," and then the section proceeds merely by way of illustration, "that is to say, of the rent at which the same might reasonably be expected to let from year to year" &c. To ascertain the net annual value regard must be had, in the language of the Earl of Halsbury in the *Mersey Docks Case* (p. 182), to "all the circumstances of the particular occupation, including therein the business that has been done on the premises." In this case one of the circumstances is that White Brothers have to dredge the Itchen in order to make their yard a rateable hereditament at all. In *Reg.* v. *Smith* (2) it was held that a rate paid under a local Act by the appellant and each of the other owners of a fishery in a large district, for the purposes of the Act, was an expense which had to be deducted in order to ascertain the rateable value of the appellant's property under s. 1, and, as was pointed out by Kennedy L.J. in *Waddle* v. *Sunderland Union* (3), "the deduction allowed was of an expense which might really be said to have been necessary for the maintenance of the essential value of the fishery itself." Similarly, it may be said in the present case that the expenditure on dredging was necessary for the maintenance of the essential value of the shipbuilding yard; without that expenditure it would be valueless. It is clear from Vaughan Williams L.J.'s observations in *Waddle* v. *Sunderland Union* (4) that "other expenses" in s. 1 are not confined to those ejusdem generis

1) [1901] A. C. 175, at p. 180.
(2) (1885) 55 L. J. (M.C.) 49.
(3) [1908] 1 K. B. 642, at p. 653.
(4) *Ibid.* at p. 649.

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with those specifically mentioned, namely, "repairs" and "insurance."

Foote, K.C., in reply. This expenditure may properly be taken into consideration in fixing the gross estimated rental, but not in arriving at the rateable value. In the *Mersey Docks Case* (1) no question of deductions was involved. It cannot be said in this case, as was said in *Reg.* v. *Smith* (2), that the expenditure was necessary for the maintenance of the essential value of the hereditament. With regard to *Waddle* v. *Sunderland Union* (3) all that need be said is that although it contains dicta to the effect that "other expenses" in s. 1 are not limited to expenses ejusdem generis with "repairs" and "insurance," it is nevertheless clear that at least they must be analogous to those mentioned in the section.

DARLING J. In this case it appears that White Brothers, who took this yard and wharf, took them at a certain rental to carry on their business, and in order to carry it on it is necessary that yachts and boats should be able to come from Southampton Water up the river Itchen and to the quays provided for the carrying on of White Brothers' business. White Brothers appealed against the rate made upon them in respect of their premises, and what we have to consider is, not whether the gross estimated rental was rightly fixed,—we must take it that it was rightly fixed—but whether White Brothers are entitled to make a certain deduction from the gross estimated rental in order to arrive at the net annual value—the deduction, namely, of the amount of money which they annually expend in dredging the channel of the river Itchen so as to allow boats to get up to their wharves and yard. The question submitted for our decision is "whether the expenses of the said dredging form a proper deduction from the gross estimated rental of the said hereditaments in ascertaining the net rateable value thereof." In my opinion those expenses do not form a proper deduction. It may have been perfectly right to take them into consideration in arriving at the gross estimated rental; that I think is in

(1) [1901] A. C. 175. (2) 55 L. J. (M.C.) 49.
(3) [1908] 1 K. B. 642.

accordance with what Lord Halsbury said in *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee* (1), namely, that all the circumstances of the case are to be taken into consideration. If, for example, one were asked to say what was the gross estimated rental of a Queen Anne house which had a beautiful façade, no one in his senses would simply look at the façade or a photograph of it, he would look inside and would ascertain the character of the neighbourhood, the view obtainable from the house, whether any one had a right to overlook it, and whether there were ancient lights; he would thus take into consideration all the circumstances of the case in order to arrive at the gross estimated rental; but it does not follow that he would be entitled to do the same thing in arriving at the deductions to be made in order to arrive at the net rateable value. Here, the landlord or the tenants have to dredge the Itchen, and, as I have said, the expense of so doing may have to be taken into consideration in fixing the gross estimated rental according to whether the dredging is done by the landlord or the tenants. That reconciles this case with what was said in *Reg.* v. *Smith* (2), *Waddle* v. *Sunderland Union* (3), and the *Mersey Docks Case.* (1) What we have to decide, however, is whether this expenditure on dredging is a proper deduction within s. 1 of the Act of 1836. That section says that "No rate for the relief of the poor . . . . shall be allowed by any justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto." The fact of that word "net" being used shows that there are two kinds of value; there is "net" and there is something else, and if the schedule to the Act is looked at it will be found that the other is "gross." The section itself then goes on to say, "that is to say,"—I do not agree with Mr. English Harrison that there is here a mere illustration; I think it tells one what to look at to get the net annual value—"of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance,"—these

(1) [1901] A. C. 175. (2) 55 L. J. (M.C.) 49.
(3) [1908] 1 K. B. 642.

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have to come off after the gross estimated rental has been arrived at; but in this case the expenses are not part of the "repairs" or "insurance," — "and other expenses, if any, necessary to maintain them in a state to command such rent." I do not think the expenditure on this dredging comes within any of those other words and therefore it cannot be deducted in arriving at the net annual value. In dealing with deductions we must be careful to include only those expenses which fall within the very words of the section. For the reasons I have given I am of opinion that the claim to deduct the expense for dredging cannot be maintained. The appeal must be allowed.

LORD COLERIDGE J. In this case a sum was fixed as the gross estimated rental. That may or may not have been ascertained by looking at all the circumstances of the case, and under those words would be included circumstances connected with dredging outside the premises to be rated. Once the gross estimated rental is ascertained the deductions allowable, in order to arrive at the net annual value, are defined by s. 1 of the Parochial Assessments Act, 1836. The allowance for dredging outside the premises must come, if at all, under the words "other expenses, if any, necessary to maintain [the hereditaments] in a state to command such rent." What are "other expenses"? Do they include expenses incurred in the physical region of the premises but outside the rateable hereditaments in order to make the rateable hereditaments more valuable? No case has been cited to show that these words include expenses incurred on premises outside the hereditament itself. The only case in which such expenses have been deducted was a case of an incorporeal hereditament such as a fishery, where a charge or tax was allowed to be deducted as an expense necessary to maintain the property in a state to command the rent. That case—*Reg.* v. *Smith* (1)—was discussed by Kennedy L.J. in *Waddle* v. *Sunderland Union* (2), in which he said (p. 653) that "the charge there in question was said

(1) 55 L. J. (M.C.) 49. (2) [1908] 1 K. B. 642.

to be an expense necessary for the purpose of maintaining the hereditament." That is to say that the hereditament would disappear if the expense were not incurred. In this case no one can say that the hereditament would disappear if the river outside were not dredged. While the expense may properly be taken into account in arriving at the gross estimated value, it does not form a proper deduction under s. 1 in arriving at the net rateable value. I agree that the appeal must be allowed.

SHEARMAN J. I am of the same opinion. The short question to be decided is whether this particular expense is what may be called a statutory deduction. I do not agree with Mr. English Harrison that the statute does not contemplate the gross value as well as the net value. By s. 1 those who are directed to levy rates are required to proceed upon this basis: they are first to fix the gross value, and that is what a hypothetical tenant who takes from year to year might reasonably be expected to pay as rent. From that gross value the section states what deductions are to be made in order to arrive at the net rateable value. It is suggested that the expenditure now in question, being an expense to make a good approach to the rateable hereditaments by making physical alterations in some other hereditament, comes within the words "other expenses . . . . necessary to maintain [the hereditaments] in a state to command such rent." But for certain dicta in *Waddle* v. *Sunderland Union* (1) I should have thought that the words "other expenses" &c. meant such expenses as were ejusdem generis with those previously mentioned; but in *Waddle's Case* (1) Vaughan Williams L.J. said they were not confined to expenses ejusdem generis with "repairs" and "insurance." The question as to what they embrace is still open and it is not for us to decide, but we are on safe ground in saying that whatever is covered by those words no case shows that they cover expenditure of money on physical alterations to premises different from those which are the subject of the rate in question. For these reasons I think

(1) [1908] 1 K. B. 642.

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quarter sessions were wrong and the question put to us must be answered in the negative.

Appeal allowed.

Solicitors for the South Stoneham Union Assessment Committee: *Cameron, Kemm & Co., for E. T. Westlake, Southampton.*

Solicitors for White Brothers: *Lowless & Co.*

J. S. H.

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Oct. 15.

THE KING *v.* CARSON ROBERTS. *Ex parte* MAYOR, &c., OF STEPNEY.

Rates—Rating of Owner—Commission allowed to Owner—Tenement "wholly let out in apartments or lodgings"—Part of House let as Office and Workshop—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 7—*Poor Rate Assessment and Collection Act*, 1869 (32 & 33 *Vict. c.* 41), *s.* 3.

Two houses in a parliamentary borough were let out in different rooms, which, at the date of the passing of the Representation of the People Act, 1867, were not separately rated. One room in one of the houses was used as a workshop, and one room in the other house was used as an office; the remaining rooms in each house were let and used as dwelling-houses:—

Held, that neither of the houses was a "dwelling-house . . . . wholly let out in apartments or lodgings" within the meaning of the exception clause in s. 7 of the Representation of the People Act, 1867, and therefore that the rating authority were entitled under s. 3 of the Poor Rate Assessment and Collection Act, 1869, to receive the rates in respect of the hereditaments from the owners and to allow them a commission on the amount thereof where such owners agreed in writing to become liable for the rates and to pay the same whether the hereditaments were occupied or not.

RULE NISI directed to A. Carson Roberts, Esq., district auditor appointed by the Local Government Board to audit the accounts of the metropolitan borough of Stepney (which forms part of the parliamentary borough of Tower Hamlets), to show cause why a writ of certiorari should not issue to remove into Court the disallowances and surcharges made by him as such auditor of the two sums of 1*l.* 4*s.* 2*d.* and 1*l.* 1*s.* 8*d.* specified in his two certificates, both dated February 13, 1914, on the ground that he

acted contrary to law in making the said disallowances and surcharges.

The Stepney Borough Council, on October 1, 1912, duly made a general rate for the parish of Whitechapel, and the rate was duly allowed by two justices. In respect of two premises—namely, 40, Newcastle Street and 21A, Leman Street,—each comprising several hereditaments separately assessed and rated, the owners paid the rates subject in each instance to a deduction of 20 per cent. from the full amount of the rate in pursuance of the provisions of the Poor Rate Assessment and Collection Act, 1869, and of agreements in writing made between the owners and the borough council under s. 3 of the said Act by which the owners agreed to become liable for the payment of the rates assessed in respect of the said hereditaments whether occupied or not.

At the audit of the accounts of the borough council for the year ending March 31, 1913, the district auditor disallowed the sum of 1*l.* 4*s.* 2*d.* in respect of the premises 40, Newcastle Street, and 1*l.* 1*s.* 8*d.* in respect of the premises 21A, Leman Street, and charged a member of the council and the town clerk with payment of these amounts.

It appeared that 40, Newcastle Street, which was built as a dwelling-house, was let out in different rooms as dwelling-houses, with the exception of one room on the second floor, which was used as a workroom. That workroom was registered as a workshop, and not more than six persons were allowed to be employed in it at the same time. No. 21A, Leman Street was similarly let out to different tenants, all the rooms being used as dwelling-houses, with the exception of one room on the ground floor, which was used as an office.

The auditor's certificate stated, in respect of each house, that "the parts in which the house in question is let out were not separately rated at the time of the passing of the Representation of the People Act, 1867."

The auditor's reasons for making the disallowances were because each of the houses, 40, Newcastle Street and 21A, Leman Street, was "'a dwelling-house wholly let out in apartments or lodgings' within the meaning of the exception clause in s. 7 of the Representation of the People Act, 1867, and therefore a

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hereditament to which s. 3 of the Poor Rate Assessment and Collection Act, 1869, cannot lawfully be applied."

The borough council claimed that they were entitled to make the allowance to the said owners as the premises were not dwelling-houses or tenements wholly let out in apartments or lodgings not separately rated within s. 7 of the Representation of the People Act, 1867.

Clavell Salter, K.C., and *E. M. Konstam*, for the district auditor, showed cause. The question with regard to each of the houses is whether it comes within the exception to s. 7 of the Representation of the People Act, 1867. That section provides that in parliamentary boroughs occupiers of dwelling-houses or tenements are to be rated and not owners, but that "where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor rate." If the houses come within those words, as it is submitted they do, the rating authority had no power to make the allowances to the owners which they did under s. 3 of the Poor Rate Assessment and Collection Act, 1869, which provides that where the rateable value of any hereditament in the metropolis does not exceed 20*l.*, the rating authority may, if the owner agrees in writing to become liable for the poor rates and to pay the same whether the hereditament is occupied or not, agree to receive the rates from him and to allow him a commission not exceeding 25 per cent. on the amount thereof. In *White & Hales* v. *Islington Corporation* (1) the Court of Appeal decided that the exception to s. 7 of the Act of 1867 had not been repealed by implication by the Act of 1869, and that where a house was wholly let out in apartments or lodgings the owners were properly rated under s. 7 of the Act of 1867 and were therefore not entitled to any reduction from the amount of the rate. The Court did not, however, have to deal in that case with the meaning of the expression "dwelling-house or tenement . . . . wholly let out in apartments or lodgings," but it discussed the material sections, and Buckley L.J. repeated what had been said

(1) [1909] 1 K. B. 133.

in *Stamper* v. *Sunderland Overseers* (1), that the words "not separately rated" meant "not separately rated at the date of the passing of the Act of 1867." At that date it is clear that the main part of s. 7 was intended to enfranchise occupiers generally, but that as regards tenement houses the intention was, by the exception, to exclude occupiers of apartments or lodgings which were not separately rated, and to make the owners rateable, thus introducing a simple and workable rule which would obviate the necessity of a troublesome inquiry by the rating authority as to how the various occupiers of tenement houses were in fact using the premises. To come within the exception the building must first be a dwelling-house, and it must be wholly let out in apartments or lodgings. The expression "wholly let out" means wholly let out by the owner, or, in other words, that he reserves no part of it to himself. The houses in question fulfil this requirement. But there are the words "apartments or lodgings." The word "apartments" is not necessarily coloured by the idea of dwelling, and the word "lodgings" is used in a general sense: see per Byles J. in *Stamper* v. *Sunderland Overseers.* (1) It is a contradiction in terms to speak of a whole house being let out in lodgings. The expression "dwelling-house or tenement . . . . wholly let out in apartments or lodgings" merely means a structure in the nature of a dwelling-house which is let out to persons who have the exclusive occupation of its various rooms, and it is immaterial to consider for what purpose each occupier uses his part of the premises. This view is supported by Byles J.'s observations in *Stamper's Case.* (1) [*Grant* v. *Langston* (2) was also cited.]

Macmorran, K.C., and *E. J. Naldrett*, in support of the rule. The houses in question do not come within the exception to s. 7 of the Representation of the People Act, 1867, as they are not "wholly let out in apartments or lodgings." It is to be observed that the Act of 1867 has been amended by s. 5 of the Parliamentary and Municipal Registration Act, 1878, which enacts (inter alia) that "in and for the purposes of the Representation of the People Act, 1867, the term 'dwelling-house'

(1) (1868) L. R. 3 C. P. 388. (2) [1900] A. C. 383.

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shall include any part of a house where that part is separately occupied as a dwelling, and the term 'lodgings' shall include any apartments or place of residence, whether furnished or unfurnished, in a dwelling-house." Occupation for domestic purposes is therefore essential to bring the case within the exception clause in s. 7 of the Act of 1867; mere occupation for any purpose is not sufficient. If mere occupation were enough there would have been no necessity for the words "let out in apartments or lodgings." These two houses or tenements are partially let out in apartments or lodgings, but to come within the exception they must be "wholly" let out. As a portion of one house is let out as a workshop and a portion of the other is let out as an office, it cannot be said that either house is "wholly" let out in apartments or lodgings. [*Griggs* v. *Stevens* (1), *Dashwood* v. *Ayles* (2), and *Rex* v. *Carson Roberts* (3) were referred to.]

LORD COLERIDGE J. In this case the question is as to the efficacy in law or otherwise of certain allowances made by the local authority, which allowances have been disallowed by the auditor and surcharged on the applicants for the rule. The premises in respect of which the question arises are 40, Newcastle Street and 21A, Leman Street. These are tenement houses occupied by various tenants, and the nature of the occupation becomes material because it is upon the construction of s. 7 of the Representation of the People Act, 1867, that the question turns. That section provides that where at the time of the passing of the Act the owner is rated instead of the occupier to the poor rate in respect of a dwelling-house or other tenement he is not to be rated after the passing of the Act except as thereinafter mentioned, and the exception is in these words: "Where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor rate." If that exception clause governs this case the owner would be the person to be rated

(1) (1909) 74 J. P. 67. (2) (1885) 16 Q. B. D. 295.
(3) [1908] 1 K. B. 407.

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for the whole of the dwelling-house or tenement and would be unable to derive any benefit by allowance or otherwise.

The next statute that is material is the Poor Rate Assessment and Collection Act, 1869, which by s. 3 provides that where "the rateable value of any hereditament does not exceed twenty pounds, if the hereditament is situate in the metropolis . . . . and the owner of such hereditament is willing to enter into an agreement in writing with the overseers to become liable to them for the poor rates assessed in respect of such hereditament, for any term not being less than one year from the date of such agreement, and to pay the poor rates whether the hereditament is occupied or not, the overseers may, subject nevertheless to the control of the vestry, agree with the owner to receive the rates from him, and to allow to him a commission not exceeding twenty-five per cent. on the amount thereof"; and by s. 4 it is enacted that the vestry of any parish may order that the owners of all rateable hereditaments to which s. 3 extends shall be rated to the poor rate instead of the occupiers, allowing the owners an abatement or deduction of 15 per cent. from the amount of the rate; and if an owner gives notice in writing that he is willing to be rated for any term not being less than one year in respect of the rateable hereditaments of which he is the owner, whether the same are occupied or not, the overseers are to rate him accordingly and allow him a further abatement or deduction of 15 per cent. from the amount of the rate. At one time there was a question whether or not the provisions of the Act of 1869 overrode the provisions of the exception in s. 7 of the Act of 1867 and enabled owners to gain the advantage of this deduction and enabled vestries in the alternative to compulsorily rate owners, allowing them deductions notwithstanding the provisions of the earlier Act; but that contention can no longer be upheld, at any rate in this Court, since the decision in *White & Hales* v. *Islington Corporation*. (1) Without going into the details of that case it is sufficient to say that since that decision it cannot be said that the earlier Act is overridden by the provisions of the subsequent Act. Therefore we are now remitted to the construction

(1) [1909] 1 K. B. 133.

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upon the mixed matter of fact and law, whether upon the facts of this case and whether, drawing reasonable inferences from those facts, these two houses come, or either of them comes, within the exception in s. 7 of the Act of 1867. If they are wholly let out in apartments or lodgings the owners must be rated and can claim no deduction or allowance under the Act of 1869; if, on the other hand, the houses are not wholly let out in apartments or lodgings, then the owners are entitled to the deduction or allowance under the Act of 1869.

The two houses as to which the controversy has arisen are, as I have said, 40, Newcastle Street and 21A, Leman Street. The facts with regard to 40, Newcastle Street are that it was built as a dwelling-house and is prima facie a dwelling-house intended for persons to inhabit, and not a factory, but one room in it is used as a workroom and is registered as a workshop in which no more than six persons are allowed to be employed at the same time. The house 21A, Leman Street presents similar features in construction and may equally be defined with the other house as a dwelling-house, but in it there is one room which is separately let out as an office and in which no one sleeps.

The question is whether these facts make the provisions of the exception in s. 7 of the Act of 1867 not applicable to those premises. Some controversy has arisen as to the use of the word "lodgings." It has been pointed out, and I think quite correctly, that we must not limit it in this section by reference to the technical meaning of the word "lodger" as applied to the Franchise Acts which involves residence or control of the owner on the premises. That certainly may be so, but nevertheless we are remitted to the question whether a dwelling-house or tenement a part of which is let out as a workshop or as an office is or is not wholly let out in apartments or lodgings. That brings us to a consideration of the words "apartments or lodgings." The words "apartments" and "lodgings" seem to me to imply inhabitancy as a dwelling-house, that is to say, a capacity, at any rate, of sleeping in the rooms, utilizing the premises as an apartment in a dwelling-house or a lodging in a dwelling-house as habitually used. The case of a dwelling-house containing a registered workshop which is subject in many respects to

various provisions of the Factory Act which limit the number of persons who may work therein, and which is subject to visits by inspectors, cannot reasonably be said to be wholly let out in apartments or lodgings. Similarly with regard to the office in 21A, Leman Street, where it is not suggested any one sleeps, it does not seem to me to come within the definition of a dwelling-house or part of a dwelling-house which is wholly let out in apartments or lodgings. With regard to those words it may be said on the one hand that it is inconvenient that the rating authority should have to inquire into the habits, &c., of the in-dwellers in these tenements—to have to investigate how they occupy the different portions of the house—and that it is inconvenient that the occupation of a portion of a dwelling-house should change the character of the rating of the whole of the other occupants. On the other hand it may be equally inconvenient and even absurd to say that because a caretaker lives domestically in a small room of a large tenement house, which may have been originally built as a dwelling-house but is now occupied for the purpose of business, the house is thereby converted into a dwelling-house wholly let out in apartments or lodgings.

In this decision I desire to limit myself to the facts before us; but having regard to the clear language of s. 7 of the Act of 1867, it is not in my opinion correct to say that it means a dwelling-house let out and occupied for domestic occupation irrespective of what the persons in the tenement do after it is so let. If that were sufficient it would have been easy to have said simply "where a dwelling-house or tenement shall be wholly let out for occupation." The language used is "where a dwelling-house or tenement shall be wholly let out in apartments or lodgings." Neither of the houses with which we are concerned can be said to be wholly let out in apartments or lodgings, and, that being so, the allowances were correct and the surcharge incorrect. The rule must be made absolute.

HORRIDGE J. The question in this case arises in respect of two separate properties, 40, Newcastle Street and 21A, Leman Street. If the letting of those two properties is of such a

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character as to bring them within the exception to s. 7 of the Representation of the People Act, 1867, the rule ought to be discharged. If, on the other hand, these buildings are not within that exception the rule must be made absolute.

No. 40, Newcastle Street is let out to various persons who occupy the different rooms for living in them, with the exception of one room on the second floor, which is a registered workshop, and as such is subject to inspection and other regulations which affect workshops. As regards 21A, Leman Street, there is a builder's office on the ground floor, the rest of the building being let out for habitation in the ordinary way.

The exception in s. 7 of the Act of 1867 with which we are dealing says this: "Where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor rate." That language seems to me to point to occupation in the sense of living on the premises; it deals with the property as a dwelling-house or tenement in the nature of a dwelling-house. It speaks of "apartments or lodgings." I do not think that if people were told that a house was let out entirely for offices they would think it correct if it were described as let out in apartments; or, again, that if people were told that a house was let out entirely for workshops they would consider that it was correctly described as let out for lodgings. The whole purview of the exception clause is to deal with letting in the nature of a residence as a house where the tenant lives, as distinguished from mere occupation. That being so, I think it is quite clear that it cannot be said of 40, Newcastle Street, where there is a registered workshop, that the house is wholly let out in apartments or lodgings. Similarly, as regards 21A, Leman Street, where there is an office, it is equally impossible to say that the house is wholly let out in apartments or lodgings. The section makes it quite clear that it has to be wholly let, and although in some cases it may perhaps work undesirable results, it seems to me that once it is found that a portion of a house is not let out in apartments or lodgings, it cannot be said that it is wholly so let. Consequently, neither of the houses in question comes within the exception in s. 7, and the rule must be made absolute.

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SHEARMAN J. I am of the same opinion. We have to construe the language of the exception to s. 7 of the Act of 1867, the material words being "dwelling-house or tenement . . . . wholly let out in apartments or lodgings." The words "dwelling-house," "apartments," and "lodgings" point to domestic occupation alone, and as soon as a dwelling-house or tenement is so let out that one of its separate rooms is exclusively let for the purposes of trade or business, it ceases to be "wholly let out in apartments or lodgings."

Rule absolute.

Solicitor for borough council: *Alfred Turner.*
Solicitors for district auditor: *Last, Sons & Fitton.*

J. S. H.

HUMPHREY AND ANOTHER *v.* TUDGAY.

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Licensing Acts—Offences—Selling by Retail without Licence—Club—Supply of Liquor to Club Members off Club Premises—Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), ss. 65, 91—94.

The committee of a registered club decided to hold a supper and smoking concert for the members, and, as the accommodation at the club premises was limited, it was arranged that the entertainment should be held at a school some distance from the club premises. On the date arranged a supply of intoxicating liquor belonging to the club was taken by members from the club premises to the school, and during the evening was served by the appellants, who were members of the club, to their fellow members on payment of the tariff. Only members of the club were supplied with liquor. The appellants were summoned under s. 65 of the Licensing (Consolidation) Act, 1910, and convicted for having sold intoxicating liquor by retail at the school which they were not then licensed to sell:—

Held, that the conviction was wrong inasmuch as what was done by the appellants did not constitute a "sale" of liquor, but merely a distribution of the same among the members of the club.

Whether, if the appellants had been proceeded against under s. 94 of the Act (which provides that "intoxicating liquor shall not be supplied in a club for consumption off the premises except to a member on the premises"), they could have been convicted, *quære.*

CASE stated by justices of Surrey.

An information was preferred by the respondent Tudgay, a police inspector, against the appellants under the Licensing

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(Consolidation) Act, 1910, for that they, on March 9, 1914, at the parish of Ashtead, were concerned together in unlawfully selling by retail at Ashtead School intoxicating liquor which they were not then licensed to sell.

At the hearing of the information the following facts were proved or admitted:—

1. The Ashtead Village Club, having its registered address at High Street, Ashtead, was a club registered under the Licensing (Consolidation) Act, 1910, and was also registered under the Friendly Societies Acts, 1896 and 1908.

2. At some date prior to March 9, 1914, it was decided by the committee of the club to have a supper and smoking concert for the members of the club, but the accommodation at the club premises being very limited, permission was obtained to hold the supper and concert at Ashtead School, which was a quarter of a mile from the club premises.

3. On March 9, 1914, the supper and concert were held at the said school, and on that date a supply of intoxicating liquor belonging to the club and to its members as such was taken by certain members of the club from the club premises to the school.

4. The two appellants, who were members of the club and acted on behalf of the club, served out the liquor at the supper and concert, and they were given instructions that care must be taken that no one but a member of the club was served, and to distribute it there in the same way as it was distributed at the club on payment of the tariff.

5. It was not disputed by the police that only members of the club were supplied with intoxicating liquor.

6. At 10.40 P.M. on the day mentioned a police constable went to the school where the supper and concert were taking place and kept observation through a window until 11.30 P.M.

7. The schoolroom was full of people, more than 100 people being present, and four men were acting as waiters.

8. The constable heard whisky and bottled beer being ordered and saw it paid for, and at 11.30 he and another constable went round to the back of the school, where there was a room fitted up as a bar, and the two appellants were serving the intoxicating liquor and taking money.

9. The constable tried the door and he thought it was locked. The appellant Humphrey opened the door and the constable said, "We are police officers and have seen you selling intoxicating liquors; have you a licence to do so?" Humphrey replied, "No." The constable said, "Are you responsible?" and Humphrey replied, "Mr. Atkinson (the other appellant) and I are responsible." The constable then put the same question to Atkinson, who replied, "Mr. Humphrey and myself are solely responsible for selling the stuff; the waiters are acting under our instructions; I have got it in black and white from the Workmen's Union that we do not require a licence, and you can see it if you like." The constable said, "You don't suggest this is your club premises?" Atkinson replied, "No, our club is shut up to-night."

On the part of the appellants it was contended that what they did did not amount to a sale within s. 65 of the Licensing (Consolidation) Act, 1910 (1), inasmuch as the liquor supplied was the property of the club and was supplied only to members of the club. It was further contended that the appellants had not acted in contravention of s. 94 of the Act (2), inasmuch as the supply of the liquor was not in a club, or, alternatively, not for consumption off the premises; or, further in the alternative, not otherwise than to a member on the premises.

On the part of the respondent it was contended that members of the Ashtead Village Club could not be served with intoxicants except on the registered premises of the club, and that the appellants were not legally entitled to sell intoxicants away from the club premises without a licence.

The justices were of opinion that an offence had been

(1) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 65, sub-s. 1: "Subject to the provisions of this Act, a person shall not sell or expose for sale by retail any intoxicating liquor unless he holds a justices' licence authorising him to hold an excise licence for the sale of that intoxicating liquor, nor at any place except that for which the justices' licence authorises him to hold an excise licence for the sale of that liquor."

Sub-s. 2 imposes a penalty for a contravention of the section.

(2) Sect. 94: "Intoxicating liquor shall not be supplied in a club for consumption off the premises except to a member on the premises; and, if any person supplies or obtains any intoxicating liquor in contravention of the provisions of this section, he shall be liable to a fine not exceeding ten pounds."

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committed against s. 65, and also against s. 94. They therefore convicted the appellants, but stated this case for the opinion of the Court as to whether they were right.

Sir Frederick Low, K.C. (*A. H. Forbes* with him), for the appellants. The appellants were charged with a contravention of s. 65 of the Licensing (Consolidation) Act, 1910, in selling intoxicating liquor by retail without a licence; but it is clear that what they did was merely to distribute the club's stock of liquor among their fellow members, and that does not constitute a "sale": *Graff* v. *Evans* (1); *Davies* v. *Burnett* (2); *Metford* v. *Edwards*. (3) The notion that a club can only distribute intoxicating liquor among its members at the club premises and that a supply of liquor becomes a "sale" when what takes place is not on the club's registered premises is founded upon no enactment and is a novel and startling proposition. Sect. 91 of the Act, which provides for the registration of premises which are habitually used for the purposes of a club in which intoxicating liquor is supplied to members or their guests, has no application in this case inasmuch as the school was not habitually used as a club, but was used only on an isolated occasion. Sect. 93, which imposes a penalty for supplying or selling liquor in an unregistered club, has clearly no application to this case, and with regard to s. 94, to which the justices refer, it has no bearing inasmuch as the appellants were not summoned or convicted under it. In any view, however, no offence was committed against s. 94, as the liquor, which was the property of the club, was supplied to members on the club premises, by them taken to the school, and there distributed among their fellow members.

The respondent was not represented.

DARLING J. This appeal must be allowed, but I desire to say that I come to that conclusion strictly upon the ground that this was a prosecution under s. 65 and not under s. 94 of the Licensing (Consolidation) Act, 1910. I do not say whether, if the prosecution had been under s. 94, the prosecution might, or might not,

(1) (1882) 8 Q. B. D. 373. (2) [1902] 1 K. B. 666.
(3) (1914) 30 Times L. R. 700.

have succeeded. I confine myself to this case, which was a prosecution under s. 65.

It appears to me that on the facts as stated all that was done was that the members of the club were supplied with intoxicating liquor belonging to the club, and that, as the Court decided in *Graff* v. *Evans* (1), is nothing but the supplying of their own liquor to themselves; there is no "sale" of the liquor. The liquor being the liquor of the whole association, the member who takes some of it puts back into the club, not the liquor, but its equivalent in money. That is not a "sale" of the liquor to him. He only takes what is his own and replaces it with something of his own although not of the same kind or quality. That is what the justices have found that the present appellants did. If the concert and supper party had taken place at the club-house and the appellants had done there exactly what they did at the school there would have been no question; but they did not do that; the concert and supper were held at the schoolroom where the liquor was taken from the club premises. That might be an offence under s. 91 of the Act if this were done repeatedly, for if the appellants made a practice of taking liquor from the club premises to the school, the school would require to be registered under s. 91; but in the case before us it is distinctly found that what was done was not habitual; it was a mere occasional thing, because for this entertainment there was not accommodation at the club for all the people attending. It was therefore unnecessary that the school should be registered.

As there was no offence committed against s. 65 of the Act, the only section for a breach of which the appellants were summoned, the conviction was wrong.

LORD COLERIDGE J. I am of the same opinion.

SHEARMAN J. The only offence charged against the appellants was that of selling intoxicating liquor without a licence, and as it is clear that there was no "sale" of intoxicating liquor by them, the conviction was wrong.

Appeal allowed.

Solicitors for appellants: *Marcus & Francis.*

(1) 8 Q. B. D. 373.

J. S. H.

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Oct. 15, 16.

AMORETTE *v.* JAMES.

Sunday Observance—Refreshment House—Excise Licence—Sale of Ice-Cream on Sunday—Sunday Observance Act, 1677 (29 *Car.* 2, *c.* 7), *ss.* 1, 3.

The mere fact that a person is the holder of a refreshment house licence does not exempt him from the operation of the Sunday Observance Act, 1677.

Case stated by justices of Haverfordwest.

An information was preferred by the respondent, John James, deputy chief constable (who was duly authorized to lay the information), under the Sunday Observance Act, 1677, against the appellant Amorette, for that he, on Sunday, March 8, 1914, in the town and county of Haverfordwest, being then a refreshment house keeper, and above the age of fourteen years, did unlawfully exercise certain worldly labour in his ordinary calling of a refreshment house keeper, the same not being a work of necessity or charity.

At the hearing the following facts were proved and admitted :—

That the appellant, who was over fourteen years of age, held a licence from the excise authorities to keep a refreshment house at the premises occupied by him, but did not hold any licence for the sale of exciseable or intoxicating liquor; that he there carried on business as a refreshment house keeper ; that on Sunday, March 8, 1914, at 8.50 p.m., he sold ice-cream in his shop to six young men who called there ; that the shop was fully lighted up, and that it contained ice-cream, lemonade, tobacco and other articles, and chairs and tables for the use of customers, and that from 8.50 p.m. onwards the shop door was open. No evidence was given of any refreshments having been sold by the appellant except such as were consumed on the premises. The appellant did not give or call any evidence and did not dispute any of the evidence given on behalf of the respondent.

For the appellant it was contended that the Sunday Observance Act, 1677, did not apply to keepers of refreshment houses holding excise licences for the sale of refreshments,

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The justices were of opinion that the Act of 1677 did apply to keepers of refreshment houses holding excise licences; they therefore convicted the appellant.

The question for the opinion of the Court was whether the justices, upon the foregoing statement of facts, in deciding that the Act of 1677 did apply to keepers of refreshment houses holding excise licences, came to a correct determination and decision in point of law.

H. W. Rowsell, for the appellant. Sect. 1 of the Sunday Observance Act, 1677, prohibits tradesmen and others exercising "any worldly labour, business, or work of their ordinary callings upon the Lord's day, or any part thereof (works of necessity and charity only excepted)," and every person of the age of fourteen or upwards is liable to a penalty for a contravention of the section. Sect. 3 provides that "nothing in this Act contained shall extend to the prohibiting of dressing of meat in families, or dressing or selling of meat in inns, cooks' shops, or victualling houses, for such as otherwise cannot be provided." In this case it is submitted, first, that ice-cream is "meat" within s. 3, and, therefore, on that ground the appellant was exempt from the provisions of s. 1. The word "meat" is not confined to flesh; it has received a much wider meaning; see, for example, *Bullen* v. *Ward* (1), where Lord Alverstone C.J. said in terms that "meat" in the section could not be limited to flesh. There the sale of fried potatoes was held to be protected by s. 3. The word "meat" includes any kind of food, liquid or solid, and ice-cream comes within that definition.

Secondly, the appellant, as the holder of a refreshment house licence, is exempted from the provisions of s. 1 of the Sunday Observance Act, 1677. This point was taken by Mr. Poland in arguing the case of *Duffell* v. *Curtis* (2), and although the actual decision was that the refreshment house keeper was not entitled to the exemption claimed inasmuch as he had not complied with the terms of his licence but had sold articles for consumption off the premises, Grove J. said: "I hold that the construction of the statute as permitting the sale in licensed houses on Sunday

(1) (1905) 74 L. J. (K.B.) 916. (2) (1877) 35 L. T. 853.

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of refreshments to be consumed on the premises to be a reasonable one." The form of the refreshment house licence as given in the schedule to the Refreshment Houses Act, 1860, entitles the holder "to keep open the said house as a refreshment house, and to sell any victual or refreshment to be consumed therein." No limitation is there imposed with regard to Sundays. This view is also borne out by the last paragraph of s. 5 of the Public House Closing Act, 1864. [*Berni* v. *Thorney* (1) and *Parker* v. *Harris* (2) were also referred to.]

Rayner Goddard and *J. G. Archibald*, for the respondent. The only effect of obtaining a refreshment house licence is that the holder can keep open his premises after 10 P.M. The Refreshment Houses Act, 1860, and the subsequent Acts relating to refreshment houses are purely revenue statutes, exacting from the holders of licences a certain payment in return for the privilege of keeping open after 10 P.M. They do not affect in any way the provisions of the Sunday Observance Act, 1677. In *Duffell* v. *Curtis* (3) the Court did not accept Mr. Poland's argument that the statute of 1677 was suspended by the licence obtained by the refreshment house keeper. The schedule to the Refreshment Houses Act, 1860, prescribing the form of licence, has been repealed by the Statute Law Revision Act, 1875, and the form actually in use is not now prescribed in any statute.

The other point now taken on behalf of the appellant, namely, that ice-cream is "meat" within s. 3 of the Act of 1677, was not taken before the justices. It cannot seriously be contended, however, that the sale of ice-cream is a sale of "meat" within s. 3. In construing that section regard must be had to the words "for such as cannot otherwise be provided," which obviously point to some necessity for the preparation of food being contemplated. As was pointed out in *Rex* v. *Younger* (4), the intention was to make provision for those who had not the means of dressing their dinner at home on Sunday. That has no applicability to the sale of ice-cream in this case.

H. W. Rowsell in reply. Underlying the case of *Duffell* v. *Curtis* (3) is the idea that the licence held by the appellant

(1) (1895) 64 L. J. (M.C.) 271.
(2) (1909) 100 L. T. 408.
(3) 35 L. T. 853.
(4) (1793) 5 T. R. 449.

exempted him from the provisions of s. 1 of the Act of 1677. Grove J.'s language clearly points to this.

LORD COLERIDGE J. The point submitted to the Court is narrowed down to this, whether on the facts stated the Sunday Observance Act, 1677, applies or does not apply to the keeper of a refreshment house who holds an excise licence to keep a refreshment house. That is the only question we have to determine.

The facts as stated are that the appellant held an excise licence from the authorities to keep a refreshment house; that he carried on business as a refreshment house keeper; and that on Sunday, March 8, 1914, about 8.50 P.M. he sold ice-cream in his shop to certain customers. Upon those facts the question submitted for our decision is, as I have said, whether the appellant as the holder of a refreshment house licence was, by implication of law, exempted from the provisions of s. 1 of the Act of 1677.

The keeping of a refreshment house does not involve the taking out of any licence unless the refreshment house keeper desires to keep open his premises for the sale of refreshments during certain otherwise prohibited hours. If he wants to keep open during those hours he must take out a licence and pay the revenue authorities for the same. It is quite true that in the form of licence originally prescribed in the schedule to the Refreshment Houses Act, 1860,—a schedule which has since been repealed—the refreshment house keeper was empowered to keep open the house as a refreshment house without any limitation being expressed, and it was at first suggested that the words "keep open" meant to keep open day by day, night by night, Sundays included, and that if a person holds a refreshment house licence he is entitled to keep open his premises on Sundays notwithstanding the provisions of the Act of 1677. I do not think that that is the true effect and meaning of the licence. The licence is merely a revenue licence permitting the holder, on payment of a certain sum to the State, to keep open during certain hours during which otherwise he would be prohibited from keeping open. In the cases which have been cited to us there is nothing to establish the proposition that the holding of such a licence destroys the efficacy of the Act

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of 1677. This point was mooted in *Duffell* v. *Curtis* (1), but the decision proceeded upon another point altogether, namely, that, quite irrespective of the licence, the appellant came within the Act of 1677 because he had sold outside the precincts of his refreshment house. Therefore in no circumstances could the appellant in that case come within the exemption contained in the Act of 1677. Our attention has been drawn to the fact that in s. 5 of the Public House Closing Act, 1864, there is a special proviso at the end of the section to this effect: "Nothing herein contained [shall] authorize any . . . . person to . . . . keep open any refreshment house, or sell refreshments otherwise than at the times and upon the conditions prescribed by the Acts of Parliament in that behalf made." It may or may not be a forced construction to put upon that language to say that the Legislature meant by it to keep open the Act of 1677, but at any rate it cannot be said that the Public House Closing Act, 1864, in dealing with refreshment houses, repealed the Act of 1677, when those words are contained in the latter part of s. 5. In my opinion the appellant was not, as the holder of a refreshment house licence, exempted from the operation of the Act of 1677.

I desire to guard myself from being supposed to decide that if the circumstances of this case were investigated the appellant might not be able to claim the benefit of s. 3 of the Act of 1677. I am not prepared to say that ice-cream cannot be "meat" sold in a victualling house within the meaning of the exception in s. 3. According to the cases meat undoubtedly is not confined to flesh; it has been extended to potatoes, and the secondary meaning of the word as given in the dictionary of Dr. Johnson shows that it implies food generally. If the justices had described the ingredients of the ice-cream and had asked us to say whether the compound, composed, let us say, of sugar, cream, flour, and lemon, constituted "meat," I should desire to reserve my opinion as to whether or not we should be bound to say that it came within the exception in s. 3. There is nothing in the term "ice-cream," as there is in the term "mutton chop," which would make it necessary for us to say that on the facts the sale of such a substance on a Sunday under the circumstances comes within

(1) 35 L. T. 853.

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the exception. This point was not taken before the justices; it is not the point upon which we are asked to give our decision, and, that being so, we cannot deal with it. We confine our decision to the one point, namely, that the holding of a refreshment house licence does not thereby prevent the operation of the Act of 1677, on the assumption that the appellant was not exempted by s. 3 of that Act. The appeal must be dismissed.

HORRIDGE J. The question we are asked to answer is whether the Sunday Observance Act, 1677, applies to the keeper of a refreshment house who holds an excise licence for the sale of refreshments. The contention was the general one that all licensed keepers of refreshment houses were protected from having proceedings taken against them under the Act of 1677. In my opinion the true view of the sections of the Acts of Parliament which deal with the granting of those licences is that there is no prohibition against any one carrying on a refreshment house, and that a person carrying on such a business need not obtain a licence unless he desires to carry it on after 10 P.M., in which case he must pay a certain sum to the revenue. These are revenue statutes and on their purview I do not think that Parliament ever intended to enact anything with regard to the Sunday Observance Act, 1677. The answer to the question put to us ought therefore to be that the justices were right in holding that the Act of 1677 does apply to keepers of refreshment houses. But I agree that if upon the case coming before us we could see that, as a matter of law, the appellant was within the exception in s. 3 of the Act of 1677, we should in some way see that the conviction was quashed. Speaking for myself, however, I think that even if the widest meaning is put upon the word "meat" in s. 3 and the meaning has been extended to include potatoes, I cannot say as a matter of law that ice-cream must of necessity be "meat" within s. 3. I agree that the appeal must be dismissed.

SHEARMAN J. I am of the same opinion. I think there are really two questions raised in this case. The first question is

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whether the holding of a refreshment house licence exempts the holder from penalties under the Sunday Observance Act, 1677. On that question I think it is quite clear that the holding of such a licence does not in any way grant absolution from such penalties. The argument for the appellant is largely founded on the form of the licence, but one sees, on considering the group of sections relating to refreshment houses, that there was no intention to grant to the holders of those licences any exemption from the infraction of any criminal statutes. Parliament did not deal with refreshment houses under that name till 1860, and s. 1 of that Act, which is purely a revenue statute, says that "From and after the 1st day of July, 1860, there shall be charged, levied and paid unto and for the use of Her Majesty, her heirs and successors, for and upon the several licences hereinafter mentioned, the respective rates and duties following; that is to say. For every licence to keep a refreshment house," so much. Then a refreshment house was defined by s. 6 in this way: "All houses, rooms, shops or buildings kept open for public refreshment, resort and entertainment at any time between the hours of nine [now ten] of the clock at night and five of the clock of the following morning, not being licensed for the sale of beer, cider, wine or spirits respectively, shall be deemed refreshment houses within this Act, and the resident, owner, tenant or occupier thereof shall be required to take out a licence under this Act to keep a refreshment house . . . ."

One therefore sees at once that it was a sort of police regulation giving power to regulate those houses, and exacting a revenue from those who wished to keep open during certain hours. That being the purview of the statute it cannot have been intended that the grant of a licence to keep open during certain hours should have the effect of protecting the holder of the licence from the consequences of a contravention of a criminal statute. It is quite true that s. 10 says that the licence shall be in the form given in the schedule, but that schedule has since been repealed, and the form of the licence is now as may be prescribed. I agree that the form which this licence takes is the best argument in favour of the appellant as it enables the appellant to keep open the house as a refreshment house, and to

sell any victual or refreshment to be consumed therein. That looks as if the statute conferred an absolute licence to do that, and to sell during what would otherwise be prohibited hours, but I cannot help thinking that the form does not alter the general purview of the Act, which was merely an Act providing that if a person wished to keep his refreshment house open after a certain time he must pay a sum to the revenue. In these circumstances it is clear that the holding of a refreshment house licence gives no exemption to the holder from the consequences of an infringement of the Act of 1677.

There is another point which I think comes within the purview of the case although it was not argued below. The question submitted to us is "whether the justices upon the foregoing statement of facts in deciding that the Act of 1677 did apply to keepers of refreshment houses holding excise licences came to a correct determination and decision in point of law." They held that the Act did apply to refreshment house keepers, and that the appellant ought to be convicted, but it seems to me that if, upon the established facts, it was clear that he ought not to have been convicted we could deal with the matter. In that way alone the question arises whether the appellant was protected by s. 3 of the Act of 1677. That section says this: "Provided that nothing in this Act contained shall extend to the prohibiting of dressing of meat in families, or dressing or selling of meat in inns, cooks' shops, or victualling houses, for such as otherwise cannot be provided . . . ." The only facts found are that at a certain hour of the day the appellant sold ice-cream to six young men, and it is said that the sale of the ice-cream was really a sale of "meat" within s. 3 to persons to whom otherwise it could not have been provided. These words are very vague and I do not propose to give my view of them. As regards "meat" I think it is quite clear from the decision in *Bullen* v. *Ward* (1) that we are entitled to interpret it as including any kind of solid food. That is the construction which is open to us according to the well-recognized meaning of the word "meat" in the English language and the meaning which has been put upon it in *Bullen* v. *Ward*. (1) I do not wish to interfere in any way with the

(1) 74 L. J. (K.B.) 916.

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construction that has been put upon this statute, namely, that it does not prohibit the selling of what is really food at any time on Sunday; and it may be that some other Court may hereafter find that what is described as ice-cream may be food; but we know nothing of its ingredients. I do not think the words of s. 3 by speaking of "meat" can mean anything else than solid food, as opposed to drink or liquid food, and I do not know whether what is described in this case as ice-cream comes nearer to solid food or liquid food; but, at any rate, the justices, on the facts before them, convicted the appellant, and it is impossible for us to say that they were wrong. We cannot interfere with their decision.

Appeal dismissed.

Solicitors for appellant: *Philpot & Co., for R. D. Gilbertson, Pembroke.*

Solicitors for respondent: *Peacock & Goddard, for H. W. D. Williams, Haverfordwest.*

J. S. H.

THE KING *v.* HUDSON.

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July 30.

Insurance (National)—Unemployment Insurance—Insured Trade—Sawmilling —Special Order of Board of Trade—Extension of Part II. of National Insurance Act, 1911, *to Workmen in Trade other than Insured Trade—Powers of Board of Trade—Jurisdiction of "competent and impartial person" appointed to inquire and report with regard to Draft Order—Mandamus to hear and determine according to law—National Insurance Act*, 1911 (1 & 2 *Geo.* 5, *c.* 55), *s.* 103; *s.* 113, *sub-s.* 1; *Scheds. VI. and IX.*

By s. 103 of the National Insurance Act, 1911, power is given to the Board of Trade to make a special Order extending Part II. of the Act to workmen in any trade other than an insured trade.

By clause 7 of the Sixth Schedule sawmilling "carried on in connection with any other insured trade" is an insured trade.

By s. 113 and the Ninth Schedule the Board of Trade may appoint a competent and impartial person to inquire and report with regard to any draft Order.

The Board of Trade made a draft special Order extending Part II. of the Act to sawmilling "whether carried on in connection with any other insured trade or not" and appointed a competent and impartial person under s. 113 and the Ninth Schedule to inquire and report with regard to the draft Order. He expressed the view that the draft Order was ultra vires the Board of Trade upon the ground that sawmilling was already included by clause 7 of the Sixth Schedule among the list of insured trades, and that therefore the Order did not extend Part II. of the Act to a trade "other than an insured trade" within the meaning of s. 103.

Upon a rule nisi for a mandamus to him to hear and determine the inquiry according to law:—

Held, that the mandamus must issue upon the grounds (1.) that he had no jurisdiction to decide whether the Order was ultra vires the Board of Trade, his only function being to ascertain whether it was desirable; (2.) that the Order was not ultra vires inasmuch as the trade of sawmilling it dealt with was, within the meaning of s. 103 and the Sixth Schedule, a different trade from the sawmilling included as an insured trade in clause 7 of the schedule.

RULE NISI obtained at the instance of the Board of Trade calling upon Alfred Arthur Hudson, Esquire, K.C. (hereinafter called "the Commissioner"), to show cause why a writ of mandamus should not issue directed to him commanding him to hear and determine pursuant to the statutes in that behalf the matter of a certain inquiry with regard to a draft extension

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Order of the Board of Trade made under the provisions of s. 103 of the National Insurance Act, 1911 (1.), on the ground that he

(1) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 84: "Every workman who having been employed in a trade mentioned in the Sixth Schedule to this Act (in this Act referred to as 'an insured trade') is unemployed . . . . shall be entitled, subject to the provisions of this Part"—i.e., Part II.—" of this Act, to receive payments (in this Act referred to as 'unemployment benefit') . . . ."

Sect. 103: "If it appears to the Board that it is desirable to extend the provisions of this Part of this Act to workmen in any trade other than an insured trade . . . . the Board may, with the consent of the Treasury, make, in manner hereinafter provided, a special order extending this Part of this Act to such workmen . . . . Provided that no such order shall be made if the person holding the inquiry in relation to the order reports that the order should not be made . . . ."

Sect. 107, sub-s. 2: "In determining any question as to whether any trade in which a workman is or has been employed is an insured trade or not, regard shall be had to the nature of the work in which the workman is engaged rather than to the business of the employer by whom he is employed."

Sect. 113, sub-s. 1: "Sections eighty and eighty-one of the Factory and Workshop Act, 1901, relating to the making of regulations under that Act, as set out and adapted in the Ninth Schedule to this Act, shall apply to special orders made under this Act."

"SIXTH SCHEDULE.

"LIST OF INSURED TRADES FOR THE PURPOSES OF PART II. OF THIS ACT RELATING TO UNEMPLOYMENT INSURANCE.

. . . .

"(5.) Ironfounding, whether included under the foregoing headings or not.

. . . .

"(7.) Sawmilling (including machine woodwork) carried on in connection with any other insured trade or of a kind commonly so carried on."

"NINTH SCHEDULE.

"PROVISIONS OF THE FACTORY AND WORKSHOP ACT, 1901, APPLIED TO SPECIAL ORDERS MADE UNDER THIS ACT.

"80.—(1.) Before the authority empowered to make special orders make any special order under this Act, they shall publish, in such manner as they may think best adapted for informing persons affected, notice of the proposal to make the order, and of the place where copies of the draft order may be obtained, and of the time (which shall be not less than twenty-one days) within which any objection made with respect to the draft order by or on behalf of persons affected must be sent to the authority.

. . . .

"(3.) The authority shall consider any objection made by or on behalf of any persons appearing to them to be affected which is sent to them within the required time . . . .

"(4.) Where the authority do not amend or withdraw any draft order to which any objection has been made, then (unless the objection either is withdrawn or appears to

had not heard and determined the inquiry according to law. Notice of the rule was ordered to be given to the Commissioner and the Bobbin Manufacturers' Association.

In pursuance of the power given them by s. 103 of the National Insurance Act, 1911, the Board of Trade made a draft special extension Order after having published a notice of the proposal to make the Order in accordance with s. 113 and the Ninth Schedule of the Act. The Order, so far as material, was as follows:—

"NATIONAL INSURANCE ACT, 1911.

"PART II. UNEMPLOYMENT INSURANCE.

"Draft Special Extension Order.

"Sawmilling, including Machine Woodwork.

"In pursuance of section 103 of the National Insurance Act, 1911, the Board of Trade hereby make the following Special Order:—

"1. The Board of Trade hereby extend the provisions of Part II. of the National Insurance Act, 1911, subject to the modification hereinafter contained to the workmen in the trade of:—

"Sawmilling, including machine woodwork, whether carried on in connection with any other insured trade or not.

"2. For the purpose of ascertaining the period of unemployment benefit a workman shall not, in respect of work in the above mentioned trade, be entitled under proviso (*a*) to the fourth paragraph in the Seventh Schedule to the National Insurance

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them to be frivolous) they shall, before making the order, direct an inquiry to be held in the manner hereinafter provided.

"81.—(1.) The authority may appoint a competent and impartial person to hold an inquiry with regard to any draft order, and to report to them thereon.

"(2.) The inquiry shall be held in public, and any objector and any other person who, in the opinion of the person holding the inquiry, is affected by the draft order, may appear at the inquiry either in person or by counsel, solicitor, or agent."

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Act, 1911, to any addition to the number of contributions which he has actually paid."

Notice of objection to the making of the Order was received from various persons in accordance with the provisions in the Ninth Schedule to the Act. The Board of Trade, after having duly considered the objections, in accordance with s. 113 and the Ninth Schedule of the Act, did not propose to amend or withdraw the draft Order, and pursuant to the section and schedule on June 6, 1914, directed a public inquiry to be held with regard to the draft Order and appointed the Commissioner to hold the inquiry and to report to them thereon.

The inquiry commenced on July 2, 1914, when certain persons (including the respondents the Bobbin Manufacturers' Association) who would be affected by the Order appeared, in accordance with the provisions contained in the Ninth Schedule of the Act, as objectors and objected to the same upon a number of grounds involving consideration of evidence as to matters of fact connected with the occupation of saw-milling and also upon the ground that the Order was not one which the Board of Trade was empowered by the Act of 1911 to make. It was contended on behalf of the Board of Trade (1.) that the Commissioner had no jurisdiction to entertain the question whether the Order was or was not one which the Board of Trade was empowered to make, but that his function was to consider the evidence called before him and to determine whether the Order was one which it was desirable should be made; (2.) that in any event it was upon the true construction of the Act of 1911 an Order which the Board of Trade was empowered to make.

It was admitted on behalf of the Board of Trade that in the ordinary sense of the word there was only one sawmilling trade, but it was contended that within the meaning of the Sixth Schedule of the Act of 1911 that trade was divided into two trades, one the sawmilling defined by clause 7 of the schedule and included, the other there defined and excluded.

The Commissioner, being of opinion that the question whether it was or was not within the power of the Board to make the Order was one which he was entitled to decide, and being further of opinion that he ought to report to the Board of Trade under the proviso

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to s. 103 that the Order should not be made on the ground that it did not extend the provisions of Part II. of the Act to workmen in any trade other than an insured trade, sawmilling being already included in the list of insured trades for the purposes of Part II. of the Act by clause 7 of the Sixth Schedule, thought it was useless to incur the expense of taking the evidence upon the facts, and therefore adjourned the inquiry sine die to enable the Board to apply to the High Court to correct his opinion if it should be wrong.

A. M. Bremner, for the Commissioner. Mr. Hudson only desires to conduct the inquiry according to law and does not wish to take any part in the argument. He desires to maintain the position of an impartial person.

L. Sanderson, K.C., and *T. Eastham*, for the Bobbin Manufacturers' Association, one of the objectors, showed cause. The proposed special Order is not an extension of Part II. of the National Insurance Act, 1911, to workmen in a trade other than an insured trade inasmuch as the Sixth Schedule of the Act includes sawmilling amongst the list of insured trades. The proposed special Order is therefore ultra vires the Board of Trade.

A writ of mandamus will not lie in the circumstances of this case to a person in the position of Mr. Hudson. He is in a judicial position. He did not decline to exercise his jurisdiction. He was prepared to make a report. He in effect said that he did not refuse to make a report, but that he must report that the Order ought not to be made on the ground that it would be ultra vires. He has in substance made a report, but on grounds which the Board of Trade contend are wrong. He has proposed to make a report, but deferred doing so in deference to the request made by the Board of Trade in order that the opinion of this Court might be obtained. The only statutory duty he had was to make a report. He may be right or wrong, but he has inquired and was prepared to report that the special Order ought not to be made. A mandamus will only be granted to an inferior tribunal where it has refused to exercise jurisdiction: Shortt on Informations, Mandamus, and Prohibition, pp. 227,

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263, 295; *Colonial Bank of Australasia* v. *Willan* (1); *Reg.* v. *Registrar of Joint Stock Companies.* (2) In the present case the Commissioner expressly exercised his jurisdiction. He has not declined jurisdiction.

As a matter of law the Commissioner was right in holding that the Order does not extend the provisions of Part II. of the National Insurance Act, 1911, to workmen in a trade other than an insured trade within the meaning of s. 103 of the Act. The scheme of Part II. of the Act is that it deals with unemployment by means of trades. It does not deal with workmen. It is clear from the Sixth Schedule that the Legislature dealt with and considered certain trades. In the building trade it included the whole trade. In the construction and sawmilling trades it left out part of those trades. It limited the sawmilling trade, in that it included it only so far as it is carried on, or commonly carried on, in connection with an insured trade. It limited the trade of sawmilling in that respect. But there is only one trade of sawmilling. The statute deals with trades which are spoken of as trades in the ordinary sense, e.g., the trade of sawmilling. By the Order the Board of Trade professes to include a part of the trade of sawmilling which has advisedly been omitted by the Sixth Schedule.

Sir J. A. Simon, A.-G., A. J. Ashton, K.C., and *Branson*, in support of the rule. The question is whether it is any part of the duty of the Commissioner to inquire whether the draft Order is in proper form. If an inferior tribunal conceives that a preliminary point arises which it must decide in order to ascertain whether it has jurisdiction and decides the preliminary point wrongly, and in consequence of that erroneous decision declines to exercise jurisdiction, this Court will interfere by way of mandamus. In *Reg.* v. *Richards* (3) Coleridge J. said: "There is a well-known distinction with respect to the cases in which this Court will interfere with the decision of an inferior Court. If the inferior Court abstain from entering upon the merits in consequence of their arriving at a wrong decision upon a preliminary point, this Court will set them right." See also *Reg.* v.

(1) (1874) L. R. 5 P. C. 417. (2) (1888) 21 Q. B. D. 131.
(3) (1851) 20 L. J. (Q.B.) 351.

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Evans. (1) In the present case the Commissioner has wrongly conceived that there was a preliminary point for him, namely, whether the Order is ultra vires the Board of Trade. If the Commissioner reported that an Order ought to be made when it was in fact bad as being ultra vires, it could not be enforced. Even if there is a preliminary point of law for the inferior tribunal to decide, if it decides wrongly, and in consequence erroneously holds that it has no jurisdiction, a mandamus will lie. It is no part of the duty of the Commissioner to inquire whether the extension Order can in law be made. His only duty is to inquire whether it is desirable that it should be made. The Commissioner is the "competent and impartial person" appointed under s. 113, sub-s. 1, and the Ninth Schedule of the National Insurance Act, 1911. There is no provision in the Act that the Commissioner must be a lawyer, and the fact that he happens to be one in the present case is irrelevant for the purpose of considering his functions under the statute. All that is required is that he should be a competent and impartial person who can make a practical inquiry. It cannot have been intended that a Commissioner who need not be a lawyer should have the power to place a final veto upon an Order made by the Board of Trade based upon his view as to a point of law. The question as to whether the Order is ultra vires does not arise for his consideration. The Ninth Schedule to the Act of 1911 shows that the Board of Trade have to consider where the line should be drawn in any Order extending Part II. of the Act to workmen in an uninsured trade. It means that, after the Board of Trade have done their best to ascertain what the practical position is, a competent and impartial person shall be appointed to make any necessary further inquiries. The report of the Commissioner against the Order is fatal to it, as it is enacted by the proviso to s. 103 that "no such order shall be made if the person holding the inquiry in relation to the order reports that the order should not be made." There appears to be no power to correct the Commissioner if he decides wrongly. Suppose he reports to the effect that "I think from a practical point of view the Order would be desirable, but I think it ought not to be made because

(1) (1890) 62 L. T. 570.

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in my opinion upon the construction of the statute the Board of Trade have no power to make it," or "because the policy of the Act is against it," the report would be fatal to the Order if the contention on behalf of the objectors is upheld. But it cannot have been the intention of the Legislature that the Commissioner should construe the Act. He is not necessarily a lawyer and has no power to state a case. He has only to decide whether it is desirable that the Order should be made. He has to decide that practical and economic question. It is a question which could be decided by a good trade union leader or by any person well acquainted with the trade under consideration. If the Commissioner has addressed his mind to the question whether or not the extension Order is ultra vires, he has not heard and determined according to law, for it is impossible to say whether that consideration has affected his mind. Even if the Commissioner had power to consider the question, he was wrong in his view that the extension Order was ultra vires.

LORD READING C.J. In this case a rule nisi was granted by the Divisional Court calling upon Mr. Hudson, K.C., to show cause why he should not hear and determine an inquiry with regard to a draft extension Order made by the Board of Trade under s. 103 of the National Insurance Act, 1911, according to law. Notice of the rule was served upon certain objectors to the extension Order. The question involved depends upon the extent of the powers which, according to our view of the National Insurance Act, 1911, are conferred upon Mr. Hudson. He was appointed under s. 113, sub-s. 1, and the Ninth Schedule of the National Insurance Act, 1911, to conduct an inquiry in order to determine whether it was desirable that the extension Order should be made. The question before us relates to Part II. of the National Insurance Act, 1911, which deals with unemployment insurance, and by s. 84 of the Act, "Every workman who, having been employed in a trade mentioned in the Sixth Schedule to this Act . . . . is unemployed," is to be entitled to unemployment benefit. In the Sixth Schedule there are seven clauses under the heading of "List of Insured Trades for the purposes of Part II. of this Act relating to

Unemployment Insurance," and by s. 103 power is given to the Board of Trade to extend the operation of the unemployment benefit to trades other than insured trades mentioned in the Sixth Schedule. On any Order made by the Board of Trade for that purpose there is a proviso under s. 103 that no such Order shall be made if the person holding the inquiry in relation to the Order reports that the Order should not be made. Under s. 81, sub-s. 1, of the Factory and Workshop Act, 1901, which is incorporated by the Ninth Schedule of the National Insurance Act, 1911, and applied to special Orders made under that Act, it is provided that the authority, in this case the Board of Trade, "may appoint a competent and impartial person to hold an inquiry with regard to any draft order, and to report to them thereon." The Board of Trade made a draft Order, called "Draft Special Extension Order," extending the provisions of Part II. of the National Insurance Act, 1911, subject to the modification contained in the Order, to workmen in the trade of sawmilling, including machine woodwork, whether carried on in connection with any other insured trade or not. Thereupon, on certain objections with respect to the draft Order having been made under s. 80 of the Factory and Workshop Act, 1901, which is also incorporated into the Insurance Act, 1911, by the Ninth Schedule to that Act, an inquiry was ordered under s. 81, sub-s. 1, of the Factory and Workshop Act, 1901, which the schedule also incorporated, and the competent and impartial person selected to hold the inquiry was Mr. Hudson. It is right to say that in those proceedings from the first Mr. Hudson has been desirous only of deciding according to law—according to the view which might be expressed by this Court—and has facilitated in every possible way the obtaining of a decision as to the powers conferred upon him by the statute.

The inquiry was then held before him, and at an early stage the point was taken—in the first instance by him—that the draft Order, into the desirability of which he was inquiring, was ultra vires the Board of Trade. It was contended that it was not an extension of the operation of the Sixth Schedule of the Act of 1911 to a trade other than an insured trade upon the ground that, as under this Sixth Schedule there were seven enumerated items under the head of "List of Insured Trades," Parliament had,

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if they were to be regarded as separate trades, already declared by clause 7 of the schedule sawmilling to be included under the Act as "sawmilling carried on in connection with any other insured trade." Therefore it was urged that it was not open to the Board of Trade to extend it by an Order, because by the Board's Order there would be an extension of Part II. of the Act not to a trade other than an insured trade, but to a trade already an insured trade, although only a part of it was by the statute insured, and that would be travelling outside the powers conferred upon the Board of Trade. It was said that the extension would conflict with the words in paragraph 7 of the Sixth Schedule, and, further, that sawmilling was included as a trade. The argument before Mr. Hudson by Mr. Ashton, who represented the Board of Trade, was that it was intended by the draft Order to include sawmilling as a whole trade, and it was mainly upon that contention, and the admission by him that what was meant by the draft Order was to include the whole trade, that Mr. Hudson came to the conclusion expressed by him, and which, in effect, was that as there was no power in the Board of Trade to make this Order he would abstain from making inquiry into the facts. He did abstain from making any inquiry into the facts, and although he has not formally reported, it is quite clear that he took the view—I am paraphrasing the language which was used by him—that in the circumstances, as he had come to the conclusion that the Order made was ultra vires, he ought not to inquire into the facts. It did not seem to him to serve any useful purpose to continue the inquiry, and, in substance, that amounted to a report that this Order of the Board of Trade was ultra vires.

Thereupon the application was made for the rule nisi for the mandamus, and we have had the advantage of the argument of Mr. Sanderson, K.C., appearing for one important section of the objectors who took part in the inquiry before Mr. Hudson. We have had no argument from Mr. Bremner, who appears for Mr. Hudson. He took the eminently proper course, in accordance with every step taken by Mr. Hudson, of simply submitting himself to the Court, with the additional statement that Mr. Hudson was anxious to obtain a decision of this Court, and

was not desirous of placing any obstacle in the way, but, indeed, wished to facilitate, so far as he could, the obtaining of a decision of the Court.

The first point taken on behalf of the objectors to the draft Order by Mr. Sanderson is that there is no power in this Court, in the circumstances, to make the rule for a writ of mandamus absolute. It is said that Mr. Hudson was acting in a judicial capacity, and that he has not refused to hear and determine the matter according to law, but that, on the contrary, he has heard it, and has come to a conclusion upon it. It is true, said Mr. Sanderson, that in coming to that conclusion he formed an opinion on the law, but he has not refused in any way to consider the matter, but, having heard arguments, he came to the conclusion that the Order was as a matter of law ultra vires, and that therefore he ought not to go further into the matter.

The opinion which we have formed is that it is plain that Mr. Hudson has, in the view which he formed, abstained from entering upon the merits in consequence of having arrived at a decision as a matter of law upon the preliminary point that the Order is ultra vires, and if this Court is of opinion that he came to a wrong decision upon the preliminary point, it has jurisdiction to issue the mandamus. It is sufficient to say that the words which I have just used are almost the ipsissima verba of Coleridge J. in *Reg.* v. *Richards* (1), which are directly applicable to this case, inasmuch as in our view the decision arrived at by Mr. Hudson upon the preliminary point was wrong in law.

Before I deal with his decision, I wish to notice a second point which was taken by the Attorney-General in answer to Mr. Sanderson, namely, that it was no part of the duty of Mr. Hudson to inquire into this preliminary point. He was, contended the Attorney-General, the competent and impartial person appointed under s. 81 of the Factory and Workshop Act, 1901, included in the Ninth Schedule of the National Insurance Act, 1911, to inquire whether it was desirable that this Order should be made, and his duty was to inquire into the facts, and report thereon, and not upon whether or not this Order was ultra vires.

(1) 20 L. J. (Q.B.) 351.

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The conclusion at which we have arrived upon that point is that it was no part of the duty of Mr. Hudson to inquire into the preliminary point. He has to determine whether the draft Order is desirable, upon the facts and arguments presented to him, but it is not for him to determine the preliminary point, nor, in our view, is it for him in reporting upon such an inquiry to consider whether the Order is ultra vires or not. There might possibly be a case where the Order into the desirability of which he was appointed to inquire appeared to him to be so flagrantly wrong that he refused to pursue the inquiry and abstained from going into the merits, because of his decision on that preliminary point. In such a case, if the matter came before this Court—and upon our present decision it could be brought before this Court—it would be our duty then to determine whether or or not the mandamus should issue; and if this Court came to the conclusion that although he was wrong in taking upon himself to decide the preliminary point, nevertheless his decision upon that point, as a matter of law, was a correct decision, the Court no doubt would exercise its discretion by saying that it would not issue the mandamus for the purpose of a merely useless further inquiry. We do not, however, intend to say, by anything to which I have given expression, that it would not be open to the person conducting such an inquiry to consider the statute, and to determine for himself, upon his view of the statute, what was its scope and what was the policy of the Legislature in passing it. That is a totally different matter from determining the preliminary point which, in our view, he has determined in this particular case.

The other point with which we have to deal is one which is raised by Mr. Sanderson, who contends that the decision at which Mr. Hudson arrived was a right one. It is clear from the report of the inquiry that this was a matter on which Mr. Hudson's mind fluctuated considerably, and I am not surprised at it, having regard to the very cogent arguments on either side. Mr. Hudson came to the conclusion which, as I have already said, we think was a wrong one. It is sufficient to say that, the point being whether or not the Order is to extend to trades other than insured trades, either the sawmilling which is intended to be

included by the Order, is already an insured trade, or if not, and it is intended to include it as an insured trade, that must be done by such an extension Order; it is either, in other words, already an insured trade, or if not, the provisions of Part II. of the Act may be extended so as to make it another insured trade. In our view the matter is plain, and the conclusion at which we have arrived is that the decision given by the Commissioner upon this point is wrong.

I would only add in that connection that it is always to be borne in mind when discussing Part II. of the Act of 1911, and especially with reference to the list of insured trades in the Sixth Schedule, that although the word "trade" may be used—and used in its popular and ordinary sense—yet the word may, to some extent, be in some respects misleading, because what is intended is, as appears from s. 107, sub-s. 2, that in determining any question as to whether any trade is an insured trade or not, regard should be had to the nature of the work in which the workman is engaged rather than to the business of the employer by whom he is employed. Therefore for certain purposes, and in order to determine questions of the character which are before Mr. Hudson, it might perhaps be convenient to substitute—only in this connection—"occupation" for "trade." In dealing with the sawmilling it would, I think, make it a little clearer. Having regard to the conclusions at which we arrive the result is that this rule for the mandamus must be made absolute.

LORD COLERIDGE J. I agree. I have nothing to add.

ROWLATT J. I am of the same opinion. Mr. Sanderson's point, as I understood, was that Mr. Hudson had not declined jurisdiction but had exercised his jurisdiction and fulfilled his duty, and reported against this Order upon the ground that it was ultra vires the Board of Trade. The answer to that, I think, is given by the Attorney-General when he contends that the Commissioner has no authority to report upon that question at all. He has no authority upon that ground to prevent, as his adverse report would do, the Order going through. If he purports to report that the draft Order is ultra vires,

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that in my judgment is not a report such as is called for by the terms of his appointment. It is in effect nothing more than a declining of jurisdiction, because he says the subject-matter is not one into which he could possibly inquire. Whether he ought in any case to do that or not seems to me to be an unimportant matter. The important matter is that, if he does it, it is a declining of jurisdiction. It is not an exercising of jurisdiction. And if he declines jurisdiction upon a wrong ground it is very old and trite law that he can be made to proceed by mandamus.

That brings one to the question as to whether he was right, as to which I only desire to add that in holding that the part of sawmilling which is not yet an insured trade, but which is now to be made an insured trade, is a separate trade for the purposes of the powers of the Board of Trade, we are not in the least prejudicing any argument which may be addressed to the Commissioner upon a contention that sawmilling as an occupation is always the same occupation. They are two wholly and entirely different points, and to use Mr. Ashton's argument in that aspect of the matter as an admission affecting the unity of the trades for the purpose of limiting the Board of Trade's power to make such an Order is a line of reasoning which frankly I cannot follow.

Rule absolute.

Solicitor for Commissioner: *The Treasury Solicitor.*

Solicitor for Board of Trade: *Sir R. Ellis Cunliffe.*

Solicitors for Bobbin Manufacturers' Association: *Busk, Mellor & Norris, for Vaudrey, Oppenheim & Mellor, Manchester.*

J. E. A.

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Oct. 13.

THE KING *v.* VICAR AND CHURCHWARDENS OF DYMOCK.
Ex parte BROOKE.

Ecclesiastical Law—Sexton, Office of—Whether a Freehold for Life in Ancient Parish.

There is no presumption of law that the office of sexton in an ancient parish is a freehold for life. The Court will therefore not issue a mandamus to restore a person to the office of sexton unless evidence is given that he held the office as a freehold for life.

Rule Nisi directed to the vicar and churchwardens of the parish of Dymock, in the county of Gloucester, to show cause why a writ of mandamus should not issue commanding them to restore the applicant for the rule, George Brooke, to the office of sexton of the church of St. Mary, Dymock, on the ground that the office of sexton was a freehold office.

In his affidavit filed in support of the rule, Brooke stated that he was appointed sexton and bellringer of the parish of Dymock at the Easter vestry about twenty-five years ago, and had since that time performed the customary duties of the office of sexton down to November 30, 1913. His salary at the commencement of his employment was 5*l.* per annum; it was subsequently raised to 8*l.* per annum, and he received the sexton's fees for marriages and burials. He was informed and verily believed that Dymock was an ancient parish, and that the office of sexton was a freehold, being an office for life, and that the sexton's salary and fees were established by custom. On May 31, 1913, he received a written notice, signed by the vicar and churchwardens, purporting to determine his office of sexton on November 30, 1913, and subsequently to the latter date he received letters from the vicar requiring him to deliver up the keys. Brooke eventually delivered up the keys, but he took up the attitude that the vicar and churchwardens were not entitled to dismiss him, and he claimed to be restored to his office.

The vicar and churchwardens in their affidavit stated that they had searched the whole of the minutes of the vestry and had

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been unable to find any record of the appointment of Brooke to the office of sexton at a vestry meeting as alleged by him; and that there was no record of any appointment by the vicar and churchwardens or any of them. No certificate or other document of appointment to the office had been produced or shown to them. They also said that to the best of their knowledge and belief there was no custom or usage in the parish whereby the office of sexton was held for life or was a freehold. They admitted that Brooke had for some time performed the duties of gravedigger and bellringer for the parish, but they alleged that his performance of those duties had been unsatisfactory and negligent, whereupon they gave him notice terminating his appointment. They submitted that there was no freehold office of sexton in and for the parish; that Brooke had never been appointed to any such office; and that the appointment, if purporting to have been made by the vestry, was invalid, the appointment being by law vested in the vicar and churchwardens.

E. W. Hansell and *A. M. Latter*, for the vicar and churchwardens, showed cause. The law regarding the nature of the office of a sexton and the right of appointment to the office is summed up in Cripps's Law relating to the Church and Clergy, 6th ed., p. 201. It is there stated that, in the absence of any custom proved, the parishioners are not the proper parties to elect to the office, and that the presumption is that the appointment lies with the incumbent if the office is united to that of clerk, or if the sexton's duties are simply those of a gravedigger; that where the offices of sexton and clerk are separate and the sexton's duties are merely to take care of the sacred vessels, to attend to the ringing of the bells, and to keep the church in order, the presumption is that the appointment is vested in the churchwardens; and that where the sexton's duties comprise those of taking care of the sacred vessels, the bells, keeping the church in order, &c., and he is also gravedigger, the presumption is that the appointment is vested in the incumbent and the churchwardens jointly. That statement of the law is founded upon the decision in *Cansfield* v. *Blenkinsop*. (1) In the present

(1) (1849) 4 Ex. 234.

case the applicant for the rule has given no evidence that he was validly elected to the office of sexton.

Secondly, the applicant fails to show that the office of sexton in this parish is a freehold office, and in the absence of such evidence the Court will not grant a mandamus. In *Ile's Case* (1), where a mandamus was prayed to restore a sexton, the Court at first doubted whether they should grant it because, as was said, the sexton was rather a servant to the parish than an officer, or one that had a freehold in his place. But upon a certificate shown from the minister, and divers of the parish, that the custom was there to choose a sexton, and that he held the office for his life, a mandamus was granted. Similarly in *Rex* v. *Thame Churchwardens* (2), on an application for a mandamus to restore a person to the office of sexton, Fortescue J. said (p. 116): "We ought not to grant a mandamus without a certificate that the sexton was chosen for life." The law is stated in the same way in Viner's Abridgment, tit. "Mandamus," p. 193; Bacon's Abridgement, tit. "Mandamus," p. 262; and Burn's Ecclesiastical Law, 9th ed., vol. iii., p. 602.

[LORD COLERIDGE J. referred to Laws of England, vol. xi., p. 478, where it is said that "In the absence of a custom to the contrary the office of sexton in ancient parishes is a freehold for life."]

That passage is not borne out by *Ile's Case* (1) or *Rex* v. *Thame Churchwardens*. (2) It is also opposed to *Merrick's Case* (3) where, in the absence of proof that the office of sexton was for life, it was held by an election committee that a vote given by Merrick in respect of his office of sexton was bad.

[DARLING J. The passage in Laws of England, vol. xi., p. 478, seems to be founded on 1 Blackstone's Commentaries, p. 395, where 2 Rolle's Abridgment, p. 234, is cited as supporting the statement; but 2 Rolle's Abridgment, p. 234, makes no reference whatever to the office of sexton.]

Thirdly, there being another remedy open to the applicant, a mandamus should not be granted. If the applicant was validly appointed to the office of sexton he can bring an action against

(1) (1671) 1 Vent. 153. (2) (1718) 1 Str. 115.
(3) (1804) 2 Peck. 91.

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the vicar and churchwardens for wrongful dismissal, or he can sue the person receiving the fees for money had and received to his use. [*Rex* v. *Stoke Damerel* (*Minister and Churchwardens*) (1) and *Roberts* v. *Aulton* (2) were cited.]

Lastly, there was evidence of neglect of duty by the applicant entitling the vicar and churchwardens to give the applicant notice terminating his employment.

Harold Hardy, in support of the rule. A sexton has at common law a freehold office for life, and in this respect he is in the same position as a parish clerk: 1 Blackstone's Commentaries, p. 395; 2 Stephen's Commentaries, 16th ed., p. 794. In *Ile's Case* (3), *Rex* v. *Thame Churchwardens* (4), as also in *Rex* v. *Taunton St. James Churchwardens* (5), the question was whether there was a custom in the particular parish for the parishioners to elect the sexton. Apart from what was said in those cases the law has always been assumed to be accurately stated by Blackstone. Unless, therefore, it can be shown that in the case of the applicant there was some arrangement made by which he was not to hold the office in the ordinary way it must be taken that he was to hold it for life. As he has held the office and performed the duties for twenty-five years, the maxim "Omnia præsumuntur esse rite acta" applies. If the vicar and churchwardens had any cause of complaint against the applicant in connection with the performance of the duties of his office they were bound to formulate a specific charge and give him an opportunity of defending himself with regard to it. It has been so held in cases relating to a parish clerk: see *Rex* v. *Davies* (6), *Reg.* v. *Smith* (7), and *Ex parte Johnson*. (8) In those cases, as no opportunity of being heard in answer to specific charges was given, the Court ordered a mandamus to issue restoring the person to his office. Here there was no specific charge against the applicant, and there was no misconduct on his part justifying the giving of notice.

[He was stopped on this point, the Court intimating that there

(1) (1836) 5 Ad. & E. 584.
(2) (1857) 2 H. & N. 432.
(3) 1 Vent. 153.
(4) 1 Str. 115.
(5) (1776) 1 Cowp. 413.
(6) (1827) 9 Dowl. & Ry. 234.
(7) (1844) 5 Q. B. 614.
(8) (1853) 17 J. P. 538

was no evidence of misconduct against the applicant such as would justify his dismissal assuming that he held a freehold office.]

As to the remaining point made on behalf of the vicar and churchwardens, namely, that a mandamus should not issue because another remedy is open to the applicant, it is to be observed that in *Ex parte Johnson* (1) Crompton J. said that although in such a case an action for money had and received might lie, in order to recover the fees, that was a remedy for the loss of the fees, but not for the removal from office. There a rule for a mandamus to restore a sexton to his office was made absolute.

DARLING J. In this case a rule was granted calling upon the vicar and churchwardens of the parish of Dymock to show cause why a writ of mandamus should not issue directed to them commanding them to restore one George Brooke to the office of sexton, on the ground that the office of sexton is a freehold office. It is true that Brooke has for many years done those things in the parish of Dymock which a sexton has to do, and I think that in one sense he may be called a sexton. He was a sexton in the sense that he rang the bell, dug the graves, and did other things about the church which a sexton has to do, but the mere fact that a person is called a sexton does not make him the holder of a freehold office; that is a matter of evidence, and the cases which have been cited to us show that the Court will only issue a mandamus to restore a person to the office of sexton provided evidence is given that he was really a sexton holding a freehold office. I know there is something against this view, for in Laws of England, vol. xi., p. 478, there is this statement: "In the absence of a custom to the contrary the office of sexton in ancient parishes is a freehold for life." For that proposition a reference is given to 1 Blackstone's Commentaries, p. 395, and certain cited cases. I have looked at the passage in Blackstone where it is stated that "Parish clerks and sextons are also regarded by the common law, as persons who have freeholds in their offices; and therefore though they may be punished, yet

(1) 17 J. P. 538.

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they cannot be deprived, by ecclesiastical censures." For that statement a reference is given to 2 Rolle's Abridgment, p. 234, but at that page in Rolle's Abridgment there is nothing whatever relating to the office of sexton. The statement in Blackstone has been reproduced in Stephen's Commentaries and again in the Laws of England. But on the same page of the latter work *Ile's Case* (1) and *Merrick's Case* (2) are also cited. *Ile's Case* (1) simply says this: "A mandamus was prayed to restore a sexton. The Court at first doubted whether they should grant it; because he was rather a servant to the parish, than an officer, or one that had a freehold in his place. But upon a certificate shewn from the minister, and divers of the parish, that the custom was there to choose a sexton, and that he held it for his life; and that he had 2*d.* a year of every house within the parish; they granted a mandamus, and it was directed to the churchwardens." *Merrick's Case* (2) is reported thus: "John Merrick voted for his office of sexton. It was proved in support of the voter's title, that he had acted as sexton of Uxbridge; and an entry was shown from the proceedings of the vestry, of his election as sexton, 29th August, 1799; but it did not appear that he had been elected for life: and no proof being given that the office was for life, the committee determined the vote to be bad. A similar determination took place afterwards, on the same day, upon the vote of George Gladman, the sexton of Ruislip." Those two cases are clear to the effect that there must be evidence that the office of sexton in the particular parish is a freehold which the person elected thereto is entitled to hold for life unless gross misconduct can be proved against him.

In this case we have to ask ourselves, has Brooke shown that he was elected to the freehold office of sexton? All that he can say in his affidavit is that he was appointed sexton at the Easter vestry about twenty-five years ago, that he has since been performing the duties of a sexton, and that he believes that the office of sexton of the parish of Dymock is a freehold, being an office for life. He gives no reason for that belief. The minute-books of the vestry have been examined and no reference is to be found to the appointment of Brooke as sexton. It is admitted

(1) 1 Vent. 153. (2) 2 Peck. 91.

that for a good many years he performed the ordinary duties of a sexton and was paid a sum of money for doing so, and that after a time that sum of money was increased. But there is no entry anywhere to show that he held the office of sexton at a salary. It seems to me therefore that this rule must be discharged on the ground that there is no evidence to satisfy the Court that Brooke ever was elected to the office of sexton in the parish of Dymock entitled to hold the office for life.

There is another ground on which the application fails, namely, that mandamus is not the only remedy open to the applicant. If he is entitled to the office of sexton as a freehold for life he can bring an action to recover the fees.

LORD COLERIDGE J. In this case two questions arise—first, whether the office of sexton is by presumption of law a freehold office, and, secondly, whether it has been proved that Brooke was appointed to that office. It is quite true that in 1 Blackstone's Commentaries, p. 395, it is stated that "Parish clerks and sextons are also regarded by the common law, as persons who have freeholds in their offices," and 2 Rolle's Abridgment, p. 234, is cited in support of that proposition, but the passage in Rolle makes no reference to the office of sexton. I have looked at an edition of Blackstone published in 1825 in which the editor (1), commenting upon the statement I have read from Blackstone's text, says this: "With respect to sextons it can hardly be said that they are regarded by the common law as having freeholds; because the tenure by which they hold, varies accordingly, and is as often during pleasure, as for life, or during good behaviour. It should seem that the presumption of law is that they hold by the first; in *Rex* v. *Churchwardens of Thame* (2) it was said that a mandamus to restore a sexton ought not to be granted unless there was a certificate that he was chosen for life. And it was decided in an election committee of the House of Commons, 2 Peck. 91, that where the office of sexton is *not shewn* to be held for life, it gives no right to vote." Therefore the dictum of Blackstone was certainly discovered to

(1) The editor of this edition was John Taylor Coleridge, Esq., afterwards Mr. Justice Coleridge.

(2) 1 Str. 115.

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Lord Coleridge J.

be erroneous so long ago as 1825, and the presumption, so far from being as stated by Blackstone, is quite the other way. This view is fortified by the decision in *Ile's Case.* (1) If there is no presumption that the office is a freehold, the evidence in this case falls far short of convincing me that Brooke was appointed to the office of sexton as a freehold office. For these reasons I agree that the rule must be discharged.

SHEARMAN J. I am of the same opinion. Even supposing that Dymock is a parish where the vicar and churchwardens have power to appoint to the office of sexton as a freehold for life, there is, in my opinion, no evidence before us that Brooke was appointed to fill that office for life.

Rule discharged.

Solicitors for Brooke: *Helder, Roberts, Walton & Giles, for R. F. M. Harvey, Gloucester.*

Solicitor for vicar and churchwardens: *G. W. Grice-Hutchinson, for T. Weldon Thomson, Tewkesbury.*

(1) 1 Vent. 153.

J. S. H.

ROBINSON & CO. *v.* CONTINENTAL INSURANCE COMPANY OF MANNHEIM.

1914
Oct. 14, 16.

War—Contract—Alien Enemy—Contract made with Alien who subsequently becomes Belligerent—Right of Action against Alien Enemy—Contract of Marine Insurance — Application by Alien Enemy to stay Proceedings against him.

There is no rule of common law which suspends an action in which an alien enemy is defendant, nor is there any rule of common law which prevents him appearing and conducting his defence.

Semble. In the event of the defendant succeeding in the action, no order which would entitle him to payment of costs during the war ought to be made, and his right to issue execution ought to be suspended until the cessation of the state of hostilities which makes him an alien enemy.

An action was brought by the plaintiffs, who were British subjects, against the defendants, a German insurance company, to recover a loss under a policy of marine insurance. After the policy was effected, the loss occurred, and the pleadings were closed, war was declared between Great Britain and Germany. The defendants took out a summons asking that all proceedings should be stayed during the war :—

Held, that the application must be dismissed.

Summons before Bailhache J. adjourned into the Commercial Court.

The action was brought by the plaintiffs, Robinson & Co., who were British subjects, against the defendants, a German insurance company, to recover a loss under a policy of marine insurance. The policy was effected, the loss occurred, and the pleadings were closed before August 4, 1914, when war was declared between Great Britain and Germany. The defendants took out a summons asking that all proceedings should be stayed during the war, and the summons was adjourned into Court.

Theobald Mathew, for the defendants. The authorities show (1.) that a contract made with a belligerent is void ; (2.) that a contract made with a person who afterwards becomes a belligerent is suspended during hostilities. In *Le Bret* v. *Papillon* (1), where the plaintiff became an alien enemy after action brought, it was held that the action was barred. That decision must be

(1) (1804) 4 East, 502.

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taken to have been reversed by *Flindt* v. *Waters* (1), where the plaintiff's principals did not become alien enemies till after the loss happened, and it was held that, the cause of action being complete before the assured became alien enemies, the plaintiff was entitled to recover from the underwriter who had wrongly pleaded the general issue, which was a plea of a perpetual bar, inasmuch as the remedy was only suspended and not barred. In *Ex parte Boussmaker* (2) an alien enemy claimed a dividend in bankruptcy, the dividend arising out of a contract made before the alien became an enemy, and it was held that the claim ought to be admitted, but that the dividend ought to be retained until after the war. In all those cases the alien enemy was plaintiff. There appears to be no English reported case in which the defendant has set up that he is an alien enemy. It is clear that when an alien enemy is making a claim upon a cause of action which was complete before he became a belligerent, his remedy is suspended. The same rule may be invoked in favour of an alien enemy with regard to a cause of action which arose against him before he became a belligerent. An alien enemy might have a substantial counter-claim. As his remedy is suspended he could not pursue it, and therefore if the action were allowed to go on against him he would be in the position of having to defend it while he was not allowed to enforce his counter-claim. He would also be under the disadvantage of not being able to come and give evidence and subpœna witnesses. An alien enemy is not an outlaw. The rule as to the suspension of the right of action upon a contract made with an alien enemy is stated in quite general terms by text-books and judges, and no exception has been engrafted upon the rule. In *Janson* v. *Driefontein Consolidated Mines* (3) the Earl of Halsbury L.C. in delivering judgment in the House of Lords said: "In order to produce the effect, either nationally or municipally, it must be a war between the two nations. No contract or other transaction with a native of the country which afterwards goes to war is affected by the war. The remedy is indeed suspended: an alien enemy cannot sue in the Courts of either country while the war lasts; but the

(1) (1812) 15 East, 260. (2) (1806) 13 Ves. 71.
(3) [1902] A. C. 484.

rights on the contract are unaffected, and when the war is over the remedy in the Courts of either is restored." And Lord Davey said: "The third rule is that, if a loss has taken place before the commencement of hostilities, the right of action on a policy of insurance by which the goods lost were insured is suspended during the continuance of war and revives on the restoration of peace. In the present case the third rule would have constituted a defence to the present action; but the parties, being desirous to obtain a decision on the merits of the case, waived the objection." [*The Hoop* (1) was also referred to.]

W. N. Raeburn, for the plaintiffs. There are several decisions relating to policies of insurance in which the position of an alien enemy who is defendant has been considered, and in which it has been held that he can be sued. If the alien enemy is within the jurisdiction so that he can be served the action can proceed. In many cases the difficulty is that an alien enemy cannot be served. If the alien enemy has been served and appeared and subsequently states that he desires to give evidence or has a relevant document which he wishes to place before the Court, but since he appeared has left this country and is unable to return for that purpose, the Court would no doubt grant him an adjournment. The plaintiff has the right to carry on his action, and the only difficulty is one of procedure. In *Albretcht* v. *Sussmann* (2) it was held that if Albretcht, an alien enemy, had merely asked for discovery he would have been granted it, notwithstanding the fact that he was an alien enemy, but that as he had asked for other relief he was not entitled to anything. That case shows that an alien enemy can be sued at law and may obtain discovery in aid of his defence. In Bacon's Abridgement, 7th ed., vol. i., p. 183, it is stated that "The plea of alien enemy is a bar to a bill for relief in equity, as well as to an action at law: but it would seem not sustainable to a mere bill for discovery; for, as an alien enemy may be sued at law, and may have process to compel the appearance of his witnesses, so he may have the benefit of a discovery." In Westlake on International Law (editions of 1904 and 1907), Part II. (War), at

(1) (1799) 1 C. Rob. 196.

(2) (1813) 2 V. & B. 323. [The plaintiff's name is apparently misspelt.]

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pp. 50, 51, a passage from a note at p. 545 of Scott's Cases on International Law is cited, where it is said that "In the case of *Clarke* v. *Morey* (1) . . . . it was held by Kent C.J. that aliens residing in the United States at the time of war breaking out between their own country and the United States . . . . may sue and be sued as in time of peace." It has been held in the American Courts that while an alien enemy may not sue he may be sued at law, and that he is entitled to all the usual means of defence, but that he cannot set up the plea that he is an alien enemy: see *McVeigh* v. *United States* (2); *Dorsey* v. *Kyle* (3); *De Jarnett* v. *De Giversville* (4); Kent's Commentaries, 12th ed., vol. i., pp. 67, 68, note 1. Sect. 1, sub-s. 7, of the Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. 5, c. 78), appears to contemplate proceedings against an alien enemy.

Cur. adv. vult.

Oct. 16. The following judgment was read by

BAILHACHE J. In this case the defendant company apply by their counsel for the postponement of the hearing of the action upon the ground that the defendant company is an alien enemy. The action is brought upon a policy of marine insurance effected on behalf of the plaintiffs, who are British subjects, with the defendant company. The policy was effected before the war. The loss was before the war and the pleadings were closed before the war. The war has had the effect of making the defendant company an alien enemy, and the defendant company contend that that fact of itself entitles the company to a postponement of the trial. The contention is that by the common law of England all actions between British subjects and alien enemies are suspended during the war, and further that an alien enemy cannot appear and cannot be heard in our Courts during hostilities.

The question has not arisen for many years, and I took time to look into the authorities which were cited to me and to consider whether both or either of these contentions is supported by authority or by principle.

(1) (1813) 10 Johnson, Sup. Ct., New York, 69.
(2) (1870) 11 Wallace, 259.
(3) (1869) 30 Maryland, 512.
(4) (1874) 56 Missouri, 440; Scott's Cases on International Law, 542.

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There is, I think, abundance of authority for the proposition that an alien enemy, if objection be taken by the defendant, cannot sue as plaintiff in our Courts and cannot proceed with an action pending in these Courts while the state of hostilities, which makes him an alien enemy, lasts. Whether he can sue or proceed with his action if no objection be taken by the defendant is perhaps open to doubt. See, for instance, the judgment of Lord Davey in *Janson* v. *Driefontein Consolidated Mines*. (1) It is, I think, equally true that a defendant alien enemy cannot during the war prosecute a counter-claim. Does the converse hold good and does the same rule obtain when an alien enemy is defendant ? If one considers the reason for the rule that an alien enemy cannot sue or prosecute his action during hostilities it would appear that on principle the rule ought to be confined to those cases where the alien enemy is plaintiff. I take it that the reason why an alien enemy when plaintiff cannot proceed with his action against a British subject during hostilities is founded upon the assumption that when two countries are at war all the subjects of each country are at war, and that it is contrary to public policy for the Courts of this country to render any assistance to an alien enemy to enforce rights which, but for the war, he would be entitled to enforce to his own advantage and to the detriment of a subject of this country. But to hold that a subject's right of suit is suspended against an alien enemy is to injure a British subject and to favour an alien enemy and to defeat the object and reason of the suspensory rule. It is to turn a disability into a relief.

I know of no modern English authority on the point except a statement by Lord Davey in the *Driefontein Case* (1), where he lays down three rules which he says are established in our common law, and expresses the third rule thus: "The third rule is that, if a loss has taken place before the commencement of hostilities, the right of action on a policy of insurance by which the goods were insured is suspended during the continuance of war and revived on the restoration of peace."

If this is a correct expression of the rule, it covers by its terms the case of an alien enemy defendant as well as an

(1) 1902] A. C. 484, 499.

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alien enemy plaintiff. It is not the decision of the House of Lords in that case, and is not therefore binding upon me, although of course it is a statement of the law entitled to great weight. In that case, however, the point did not arise for decision; moreover, the alien enemy in that case was the plaintiff and the British subject was the defendant, and I doubt whether Lord Davey contemplated the converse case. I observe that other members of the House who took part in that decision confine themselves to the statement that an alien enemy cannot sue while the war lasts. (See per Lord Halsbury, at p. 493; Lord Lindley, at pp. 509 and 510.) In the 7th edition of Bacon's Abridgement, vol. i., at p. 183, the law is thus stated: "The plea of alien enemy is a bar to a bill for relief in equity, as well as to an action at law: but it would seem not sustainable to a mere bill for discovery; for, as an alien may be sued at law, and may have process to compel the appearance of his witnesses, so he may have the benefit of a discovery."

The statement of the rule by Lord Davey seems to me to be expressed in too wide terms. Mr. Raeburn, for the plaintiffs, was good enough to refer me to several American authorities. The law there appears to be clear that an alien enemy may be sued during the continuance of hostilities. There is an elaborate judgment of the Supreme Court of Missouri to that effect in *De Jarnett* v. *De Giversville* (1) and in a case before the Supreme Court of the United States, *McVeigh* v. *United States*. (2) At p. 267 of the report Swayne J., in delivering the unanimous judgment of the Court, says: "Whatever may be the extent of the disability of an alien enemy to sue in the Courts of the hostile country, it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defence," and he quotes the passage from Bacon's Abridgement which I have already cited.

Fortified by the passage from the Abridgement, by these American decisions, and by my view of the reason for the rule which forbids an alien enemy to sue, I am of opinion that the rule is confined to cases in which the alien enemy is plaintiff, and that war does not suspend an action against a defendant alien enemy.

(1) 56 Missouri, 440. (2) 11 Wallace, 259

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The next question is, Can he appear and defend either personally or by counsel? I think he certainly can. To allow an action against an alien enemy to proceed and to refuse to allow him to appear and defend himself would be opposed to the fundamental principles of justice. No state of war could, in my view, demand or justify the condemnation by a Civil Court of a man unheard. The point came before the Supreme Court of the United States in the case just cited. The District Court had allowed an action to proceed against an alien enemy, but had struck out his claim and answer. Swayne J. deals with the matter in these words: "The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no locus standi in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice." I desire to adopt the language of the learned judge as my own, except that I am not such a convinced disciple of Rousseau as to be able to base any opinion upon the principles of the social compact to which Swayne J. refers. (1)

I have come to the conclusion that there is no rule of common law which suspends an action in which an alien enemy is defendant, and no rule of common law which prevents his appearing and conducting his defence.

In this case I understand that the presence of the alien enemy in this country at the trial is not necessary and is not contemplated, and no difficulty arises such as might otherwise be created by the impossibility of his getting here, and no question arises in this case as to whether an express licence to come into this country is necessary or whether a licence would be implied from the fact of the process of the Court, and I express no opinion upon it. It may be that in this case the war has so hampered the defendants in the preparation of their case, in their witnesses,

(1) [The doctrine of the social contract, as found in American publicists, is derived from Locke rather than from Rousseau. See Scherger, The Evolution of Modern Liberty, New York, 1904.—F. P.]

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or in other ways, that it would be right to grant them a postponement on those grounds. If any application is made to postpone the trial on grounds of that character it will be dealt with on its merits. I know nothing of the merits of this case, and it may be that the defence will succeed. In that case, a question would arise as to costs. I will hear argument about it if the point does arise, but as at present advised I do not think I ought to make any order which would entitle the defendants to payment of costs until after the war. I mention this point now because in considering my judgment it occurred to me as a possible difficulty in the way of allowing the action to proceed. I think, however, the difficulty, if it arises, is sufficiently met by suspending the defendants' right to issue execution.

Application dismissed.

Solicitors for plaintiffs: *Lowless & Co.*
Solicitors for defendants: *Waltons & Co.*

J. E. A.

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Oct. 26, 27.

THE KING *v.* THE BOARD OF TRADE.
THE KING *v.* LIGHT RAILWAY COMMISSIONERS.

Light Railway—Application to Commissioners—One written Application in respect of Scheme comprising several Railways—Application allowed in respect of some but refused in respect of other Railways—Right of Appeal to Board of Trade—"Application refused"—Light Railways Act, 1896 (59 & 60 *Vict. c.* 48), *s.* 7, *sub-s.* 6.

When an application is made, under s. 2 of the Light Railways Act, 1896, to the Light Railway Commissioners, by one written document, for an order authorizing the construction of what are described in the document as several separate light railways comprised in one scheme, and the Commissioners grant the application in respect of most but refuse it in respect of some of the railways, the document may be treated as containing a separate application in respect of each railway described, so that an appeal will lie to the Board of Trade against the refusal of "an application for a light railway," within the meaning of s. 7, sub-s. 6, of the Act.

RULES NISI for prohibition and certiorari.

Four urban district councils, acting by a joint committee, made an application to the Light Railway Commissioners, in

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pursuance of the Light Railways Acts, 1896 and 1912, for an order to authorize the construction by those councils jointly of twenty-two light railways comprised in one scheme described as the Dearne Valley Light Railways. The application was made in writing by one document, which separately described each of the proposed railways.

The application was heard by the Commissioners, when it was opposed by the Great Central Railway Company and the Midland and North Eastern Railways Joint Committee. In the result the Commissioners decided to grant the application in respect of eighteen of the proposed railways; but they refused the application in respect of three railways, and the promoters had abandoned the application in respect of one railway.

The district councils thereupon appealed to the Board of Trade, under s. 7, sub-s. 6, of the Light Railways Act, 1896 (1),

(1) The Light Railways Act, 1896 (59 & 60 Vict. c. 48):

Sect. 2. "An application for an order authorising a light railway under this Act shall be made to the Light Railway Commissioners, and may be made:—

"(*a*) by the council of any county, borough, or district, through any part of which the proposed railway is to pass; or

"(*b*) by any individual, corporation, or company; or

"(*c*) jointly by any such councils, individuals, corporations, or companies."

Sect. 7, sub-s. 4. "If after consideration the Commissioners think that the application should be granted, they shall settle any draft order submitted to them by the applicants for authorising the railway, and see that all such matters . . . . are inserted therein, as they think necessary for the proper construction and working of the railway."

Sub-s. 6. "Where an application for a light railway has been refused by the Light Railway Commissioners, the applicants, if the council of any county, borough, or district, may appeal against such refusal to the Board of Trade, who may, at any time, if they think fit, remit the application or any portion thereof to the said Commissioners for further consideration with or without special instructions."

Sect. 24. "An order authorising a light railway under this Act may be altered or added to by an amending order made in like manner and subject to the like provisions as the original order.

"Provided that:—

"(*a*) the amending order may be made on the application of any authority or person; and

"(*b*) the Board of Trade, in considering the expediency of requiring the proposals for amending the order to be submitted to Parliament, shall have regard to the scope and provisions of the original order . . . ."

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against the decision of the Commissioners refusing the application in respect of two of the proposed railways. The Board of Trade entertained the appeal and remitted the application with regard to the said two railways to the Commissioners for further consideration.

The Commissioners then held an inquiry for the further consideration of the said two railways, when counsel for the said railway companies appeared and objected to the further consideration of the matter upon the ground that the Commissioners had no jurisdiction, inasmuch as the application of the promoters had not been refused by them, and the promoters had no right of appeal to the Board of Trade. The Commissioners decided that they had jurisdiction to proceed with the further inquiry, and counsel for the opponents thereupon withdrew and took no further part in the proceedings.

Subsequently the said railway companies obtained rules nisi for a prohibition and a certiorari against the Board of Trade; and also rules nisi for a prohibition and a certiorari against the Light Railway Commissioners.

G. A. H. Branson showed cause for the Board of Trade. A writ of prohibition, which is a judicial writ addressed to an inferior Court, will not lie against the Board of Trade, which is a committee of the Privy Council.

Clavell Salter, K.C., *A. J. Ram, K.C.*, and *W. J. Jeeves* showed cause for the district councils. The application for the two railways in question was "refused," within the meaning of sub-s. 6 of s. 7 of the Act, and therefore the councils had a right of appeal to the Board of Trade. This Act was designed to facilitate the construction of light railways, which the Legislature thought would be beneficial to the country, and the proceedings required to be taken are flexible and untechnical. In this case the only way in which the councils can obtain a rehearing with regard to the two railways in question is by appeal under sub-s. 6. Unless the meaning of that sub-section is that, in order to constitute a "refusal," the Commissioners must refuse the application in respect of all the proposed railways, there is in this case a right of appeal. Inasmuch as the application was

refused in respect of each of these two railways, "an application has been refused," within the meaning of sub-s. 6. It cannot be the intention of the Act to compel the applicants in a case like this to make a separate written application in respect of each railway in order to preserve a right of appeal if some of them are refused. [They referred to ss. 2, 8, 10, 17, and 24 of the Act.]

F. T. Barrington-Ward, for the Great Central Railway Company, in support of the rules. The Commissioners are a body of experts appointed to consider these matters, and their decisions ought not to be lightly reversed by the Board of Trade. Their duties are set out in s. 7; s. 2 shows by whom an application for an order authorizing a light railway can be made; and s. 17 enables joint committees of councils to be appointed "for the purpose of any application for an order." The effect of these sections, coupled with the provisions of sub-ss. 3, 4, and 5 of s. 7, is that the Commissioners are to decide whether it is expedient to grant an application, but that the sanction of the Board of Trade must be obtained before an order is to have any effect; and that an appeal lies to the Board of Trade only if the application as a whole is rejected. Sect. 7, sub-s. 6, must be read together with s. 2, and a refusal within sub-s. 6 is the refusal of what is applied for under s. 2. In this case there was but one application, and the scheme is one single scheme of railways made up of several arbitrarily divided parts. The subject-matter of the application was the whole scheme, and the application for that scheme of railways has been granted, and not refused, although a part of it has been rejected. There was but one application made, by one document, under s. 2, and it cannot be said that that application has been refused.

H. Courthope-Munroe, K.C., for the Midland and the North Eastern Railways. In sub-s. 6 the words are "for a light railway," not "for any part of a light railway"; but the argument on the other side is, in effect, that the words "any part of" must be read into the sub-section. When the Commissioners refuse an order as to part only of the scheme comprised in one application under s. 2, "an application" is not "refused" within sub-s. 6; the words in sub-s. 6 are the same as those in

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s. 2. Sub-s. 4 of s. 7 deals with the case where the Commissioners think that "the application" should be granted, and sub-s. 6 with the case where "an application" is refused; but that change of words cannot make any difference. "An application" means the whole application. When the scheme applied for has been granted with some omissions, the applicants cannot reopen the question as to those omissions by appeal to the Board of Trade. The opponent railways do not ask for prohibition against the Board of Trade, but only against the promoters.

LORD COLERIDGE J. This case raises a question of construction of several clauses of the Light Railways Act, 1896. The relevant clauses are s. 2, s. 7, sub-ss. 4 and 6, s. 10, and s. 24. [His Lordship read these sections.]

The facts of the case briefly are these. There was a document which has been referred to as the application by a joint board of various urban district councils for a system of light railways to be constructed; and in that document twenty-two lines, which are there described as railways, are applied for. The matter came before the Light Railway Commissioners, and in regard to all of them, except four, the application was granted. With regard to these, one was abandoned, and with regard to another an appeal was lodged, but was abandoned. With regard to the other two which were refused, the district councils sought to put in force the appeal to the Board of Trade under sub-s. 6 of s. 7. The Board of Trade entertained the appeal, and eventually declared their opinion to be that this matter should be remitted to the Commissioners "for further consideration." The question is whether, in the circumstances of the case, there was any right to appeal, that is, whether this is a case where "an application" for a light railway has been "refused."

The first point raised was whether this document, which applied for these twenty-two railways, was "an application for a light railway," and if so, whether the application was refused. The argument on one side was that, as a substantial part of it has been granted, the omission of the subsidiary portions of that application, of the two lines of railway, was not tantamount to a refusal of an application for a light railway. The argument

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on the other side was that, if the document is reasonably looked at, it is in the nature of a number of severable applications, most of which have been granted, but two of which have been refused. Certainly the argument was strong that, if, instead of embodying the descriptions of these twenty-two light railways in one document, the applications had been severed, and if in fact an application had been made for each of them by a separate document, in form the objection would have been removed; that is to say, the rejection of the two railways would be the refusal of applications for these two specific railways. I have looked at the plans, and it seems to me that the right view is that these are separate applications for separate railways. It is true that they are more or less embodied in what is called a system, but it is perfectly clear that these two railways can be in fact severed, and have been severed, and, according to the view of the Light Railway Commissioners, ought to be severed from the rest of the application. If this view is correct, then it is perfectly clear that the application for these two railways has been refused, and that the powers of the Board of Trade under sub-s. 6 of s. 7 would apply; and then all the other difficulties which have been suggested are, by that interpretation of the document, surmounted.

It is not necessary, therefore, for me to go further and to decide upon the other knotty questions which have arisen; but if that view is not right, the question would then arise whether sub-s. 6 of s. 7 could not apply where an application has been refused with regard to a substantial portion of an application. That must depend a good deal upon examination of values. Could an application which was granted only as to an almost negligible portion and refused as to the substantial portion reasonably be said to be an application which had been granted and not refused? On the other hand, if an application was granted as to all but a negligible quantity, could such application be said to have been refused? I think that those questions must be determined by the facts in each case. I do not think myself that the fact that a portion of the application has been granted in law and under all circumstances prevents sub-s. 6 of s. 7 applying and an appeal lying to the Board of Trade. I

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think that it must be a question of fact in each case. I am not, however, driven to the consideration of these matters, if my view is correct, namely, that the true interpretation of the document in question is that these are really separate applications for the two lines in question. In that case it is admitted on all hands that all the other contentions as to the construction of sub-s. 6 of s. 7 fall to the ground. I base my decision upon that view of the facts. That being so, it seems to me that there was a right of appeal to the Board of Trade, and that the Board of Trade had power to remit for hearing, and were acting within their powers in remitting the application to the Commissioners for further consideration.

ROWLATT J. I agree, but I think the point is one of some difficulty. It appears to me that all the possible results of an application and the subsequent proceedings are to be found in sub-ss. 4 and 6 of s. 7, which say: [His Lordship read them.] "An application for a light railway" can only mean an application for an order authorizing a light railway. That is the exact effect of the phrase, which, read literally, means nothing, because persons do not apply for, and are not given, a light railway, but apply for, and are given, an order. Sub-s. 6, therefore, only applies to a case where an application for an order has been refused. Does that mean where no order is granted, or where an order has been granted, but not as asked? I think that, as sub-s. 6 and sub-s. 4 seem to be in strong contrast, sub-s. 6 must be limited to the case where an application for an order has been refused. The difficulty is in applying that to this case. I do not think that we can hold that sub-s. 6 applies to the case of an order being granted subject to some amendments or something of that kind. I do not think it is intended to give the Board of Trade so wide a jurisdiction as that. What is the other extreme? It is that, if anything is granted which is asked for, sub-s. 6 does not apply. That is an exceedingly narrow view, because it is obvious that in some cases perhaps quite a small part might be granted and in substance the whole be refused, when this procedure by appeal would not be open. I think, therefore, that we are driven to look at the substance of the matter and

to see whether, upon the facts, there has not been a total refusal of a substantive severable application, and that, in coming to the conclusion whether that has been so, we are not bound to consider whether the application has been made in one document or in several. Here we have a written application which includes a great many so-called separate railways, which represent in fact only the successive lengths of railways which are in separate parishes or districts. I rather shrink from holding that it is necessarily a separate application for every railway which is described by a different number. It may be so, but I certainly do not so hold on this occasion. When, however, we look at the facts of this case, we see that these two lines form a length of railway which can be regarded by itself as a railway of independent importance and capable of being authorized or refused as a whole. That being the view I take of the facts, I think that the respondents are entitled to say that an application for these two railways has been refused in toto, and that therefore sub-s. 6 applies. I am quite aware, and that is what causes me the difficulty, that it is not satisfactory to find questions of jurisdiction depending on a view of facts, because facts concern the merits and not the jurisdiction; but after the best consideration I can give to this point, I have come to the conclusion that this application can only be dealt with in the way I have stated. These rules must, therefore, be discharged.

SHEARMAN J. I am of the same opinion, but I think the true construction of this Act is not at all clear. In arriving at an interpretation of s. 7, sub-s. 6, we have to consider the rest of the Act, and, before considering the Act, I think one must not lose sight of the state of affairs to remedy or to alter which the Act was passed. The Act is one to facilitate the making of light railways throughout the kingdom, and it is clear, from some f its provisions, that it was intended to grant special facilities for the promotion of schemes for light railways by local authorities. Before the Act was passed trouble arose from the expense and the cumbrous procedure which had to be applied to what were, to a considerable extent, small schemes. Before the Act, a scheme of this sort had to go before committees of the two Houses

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and go through all the machinery requisite for it to be passed into statute law. It was desired to cheapen and accelerate the course of applications for light railways and particularly applications for light railways by local authorities. The Act was passed to give effect to those objects, and certain jurisdiction was given to the Light Railway Commissioners, a body created by the Act, and a species of supervising authority was given to the Board of Trade. The machinery for carrying out what was enacted appears in various sections of the Act.

The word "application" first occurs in s. 2, which says: [His Lordship read the section.] Obviously the word "application" means a request, but I am unable to read it as meaning any particular document. It is a word of general application, and I read it to mean a request to be made (no doubt, in practice, in writing) to the Light Railway Commissioners for an order authorizing a light railway. It is argued on behalf of the railway companies that an application for an order means some document which is in itself to be treated as a collective whole. That is a formidable argument, because in s. 7 we find alternative provisions, in sub-s. 4 as to granting "the application," and in sub-s. 6 as to refusing "an application." I am most unwilling to draw any inference from the alteration of the phrase from "the" to "an," and I do not attach importance to it; but it is curious that that difference is made. The application being for an order, there are then provisions, in s. 24, under which an order authorizing a light railway may be amended upon another inquiry and another order superimposed upon the previous order. It was argued in support of the rules (and it is a very formidable argument) that these sections read together mean that when any part of an application is granted then the application has been granted, and that if the application has once been granted it cannot be said that it has been refused. It appears to me that that is one interpretation which might be given to the words; but it also appears to me that another interpretation can be given to the words, that is, not to attach any magic to the word "application" or to confine it to a single document, but to treat the words "application shall be made" as applying to any occasion upon which any one applies for an order for a railway. If it

only means that, I am unable to see that, if what are really two separate applications are included in one document, the fact that they are included in one document prevents the jurisdiction given by sub-s. 6 applying, there being two possible interpretations to be given to the word "application." It appears to me, considering the scope of the Act, and particularly the desire of the framers of the Act to give special privileges to local authorities, that it cannot have been intended to cut down those privileges in cases where a local authority, or a group of local authorities, have applied for what are really many different railways, and have included them all in one document and then have had some of them granted and some of them refused. I think it is possible, and that all the sections can reasonably be so read together, to give a distributive as well as collective meaning to the word "application," and that the application in respect of each railway can be treated as a separate application. Each in effect is a separate railway in itself, an application for which has been included with other applications.

That being in my judgment the true interpretation of this Act, it follows that the Board of Trade had jurisdiction in this particular case to remit the application for the two railways in question to the Light Railway Commissioners, and that consideration disposes, as I understand, of every one of these motions.

Rules discharged.

Solicitor for the Board of Trade: *The Solicitor to the Board of Trade.*

Solicitors for the district councils: *Butterworth & Co., for Bury & Walkers, Wombwell.*

Solicitor for the Great Central Railway Company: *Dixon H. Davies.*

Solicitor for the Midland and North Eastern Railways: *Beale & Co.*

J. H. W.

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July 30.

METFORD and Others, Appellants *v.* EDWARDS, Respondent.

Licensing Acts—Sale of Intoxicating Liquor—Club—Ownership of Liquors—Distribution among Members—Club not conducted in Good Faith—Sale—Supply—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 & 1 *Geo.* 5, *c.* 24), *ss.* 65, 91, 95.

Where the members of an association are the owners of intoxicating liquors kept on the premises of the association and intended for consumption by the members the distribution of the liquors among the members by one of their number, although in return for payment, is not a sale by retail within the meaning of s. 65 of the Licensing (Consolidation) Act, 1910, even though the association having been registered as a club under s. 91 of the Act is liable to be struck off the register under s. 95 on the ground that it is not conducted in good faith as a club.

Graff v. *Evans* (1881) 8 Q. B. D. 373 followed and applied.

Case stated by the stipendiary magistrate of Pontypridd.

On December 5, 1912, there were laid and issued by and at the instance of the respondent, a superintendent of police, against Noah Metford and others, the appellants, being the steward and officers of the Tonypandy County Working Men's Club and Institute, informations and summonses which, after certain amendments, charged the appellants with unlawfully selling by retail certain intoxicating liquor on October 5, 1912, which they were not then licensed to sell by retail. (1) The informations

(1) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24):

Sect. 65. "(1.) Subject to the provisions of this Act, a person shall not sell or expose for sale by retail any intoxicating liquor unless he holds a justices' licence authorizing him to hold an excise licence for the sale of that intoxicating liquor, nor at any place except that for which the justices' licence authorizes him to hold an excise licence for the sale of that liquor . . . ."

Sect. 91. "(1.) The secretary of every club which occupies a house or part of a house which is habitually used for the purposes of a club, and in which any intoxicating liquor is supplied to members or their guests, or any other premises which are habitually so used, and in which any intoxicating liquor is so supplied, shall cause the club to be registered in manner provided by this Act.

"(2.) The registration of a club under this Act shall not constitute the club premises licensed premises, or authorize any sale of intoxicating liquor therein which would otherwise be illegal . . . ."

were heard together, the case alleged against the appellant Noah Metford being one of aiding and abetting.

On the hearing of the informations the following facts were admitted or proved:—

(*a*) On February 6, 1911, the Tonypandy County Working Men's Club and Institute (hereinafter called "the club") was duly registered with the clerk of the justices of the petty sessional division in which the club premises were situated in accordance with ss. 91 and 92 of the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), and on March 7, 1911, the said club was registered with the Registrar of Friendly Societies under the provisions of the Friendly Societies Act, 1896.

(*b*) On January 22, 1912, a return was made by the secretary of the club to the clerk of the justices of the petty sessional division in which the club was situated in accordance with s. 92 of the Licensing (Consolidation) Act, 1910. A copy of the rules of the club was attached to and formed part of the case. (1)

(*c*) On October 5, 1912, the club was entered by the police, who purported to act under the powers of a search warrant granted under s. 96 of the Licensing (Consolidation) Act, 1910.

(*d*) On October 5, 1912, the club premises consisted of two cottages which were in a dirty and dilapidated condition and quite unfit for use as club premises. One of the rooms on the ground floor of the cottages was fitted up as a public-house bar. At the time when the police entered sixteen persons were in the room, each of them provided with intoxicating liquor. The appellant Noah Metford and his wife were standing behind the bar serving intoxicating liquor to those who were on the premises and receiving money in exchange therefor.

(*e*) On October 5, 1912, the stock of intoxicating liquor upon the club premises consisted of eight barrels of beer, 532 bottles of wines and spirits, 204 bottles of beer and stout, and twenty gallons of cider.

(*f*) When the police entered there were fifty-nine persons present on the club premises, all provided with intoxicating liquor, of whom six were drunk and five under the influence of

(1) See note on p. 182, post.

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drink. One of the persons under the influence of drink was the vice-chairman of the club.

(*g*) Of the fifty-nine persons present fourteen were persons of whose election as members of the club there was no record in the minutes although their names appeared on nomination forms.

(*h*) The books of account found on the club premises showed that during the twelve months preceding the raid takings in respect of intoxicating liquor amounted to 1664*l.* 13*s.* 3*d.*, and that members' subscriptions for the same period amounted to 46*l.* 15*s.*

(*i*) Forty-four persons were seen leaving the club premises in a drunken condition on eight different days in the months of July, August, and September, 1912.

(*j*) On November 6, 1912, complaint was made by the respondent (1.) that the club was not conducted in good faith as a club; (2.) that there was frequent drunkenness on the premises of the club; (3.) that illegal sales of intoxicating liquor had taken place on the premises of the club; (4.) that persons who were not members were habitually admitted to the club merely for the purpose of obtaining intoxicating liquor; (5.) that persons were habitually admitted as members of the club without an interval of at least forty-eight hours between their nomination and admission; (6.) that the supply of intoxicating liquor was not under the control of the members (or the committee appointed by the members). On November 6 a summons was issued, addressed to the club, summoning the club to answer the complaints and to show cause why an order should not be made directing the club to be struck off the register. A copy of the summons was attached to and formed part of the case.

(*k*) On November 28, 1912, the complaint came on for hearing before two justices of the peace for the petty sessional division of Pontypridd, who found that the club was not conducted in good faith as a club and that there had been frequent drunkenness on the premises of the club, and ordered that the club should be struck off the register of clubs for a period of twelve months. A copy of the order made on November 28, 1912, was attached to and formed part of the case.

(*l*) The appellant Noah Metford was the steward of the club. The other appellants were the chairman, vice-chairman, secretary,

treasurer, trustees, and committeemen of the club. The appellant Noah Metford was paid a wage of 2*l.* 10*s.* per week.

The respondent contended that the appellants other than Noah Metford were guilty of unlawfully selling by retail intoxicating liquor which they were not then licensed to sell by retail on October 5, 1912, and that the appellant Noah Metford was guilty of aiding and abetting the other appellants in the commission of that offence.

The appellants contended:—

1. That there had been no sale of intoxicating liquor within the meaning of the Licensing (Consolidation) Act, 1910;

2. That inasmuch as the club was registered in accordance with the provisions of the Act and had not on October 5, 1912, been removed from the register, it was a legal entity, and the members of its committee could not be held individually responsible for the offence alleged against them, and that in law there had been no sale of any intoxicating liquor by or on behalf of the appellants.

The magistrate accepted the contention of the respondent and convicted all the appellants other than Noah Metford of selling by retail intoxicating liquor which they were not licensed so to sell. He also accepted the contention of the respondent with regard to the charge against the appellant Noah Metford and convicted him of aiding and abetting the other appellants.

By an order of the King's Bench Division dated October 16, 1913, the special case was remitted to the magistrate for the purpose of restatement showing—

1. Whether the sales were made to non-members of the club and if so by whom;

2. Whether s. 95 of the Licensing (Consolidation) Act, 1910, was complied with;

3. Whether sales were made to alleged members of the club and, if so, whom the liquors sold belonged to.

In obedience to this order the magistrate restated the case as follows—

"1. There was no evidence that any sales were made to non-members of the club, and I did not find as a fact that there had been any such sales.

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"2. I was not satisfied that persons were habitually admitted as members of the club without an interval of at least forty-eight hours between their nomination and admission and I did not find that there had been any breach of s. 95 (*g*) of the Licensing (Consolidation) Act, 1910.

"3. Certain alleged members of the club who were present on the club premises on October 5, 1912, when the police entered, were heard ordering intoxicating liquors from the steward and were thereupon handed such liquors by the steward, to whom they in return handed some money. From the evidence given as to the general method of conducting the club I found as a fact that the intoxicating liquors, with which every person present when the police entered had been supplied, had been ordered, delivered, and paid for in the manner described above as having been heard and seen on October 5, 1912, but there was no evidence to identify the persons who had so ordered and paid for the said liquors or to show whether they were members of the club or non-members. The said intoxicating liquors formed part of the general property of the club and as such were by virtue of rule 14 vested in the trustees of the club representing and acting for the whole of the members of the club.

"One of the questions which arises for the opinion of the Court herein is whether the transactions described in the last paragraph above constituted sales of intoxicating liquors within the meaning of the Licensing (Consolidation) Act, 1910."

By an order of the King's Bench Division dated May 2, 1914, the special case was remitted to the magistrate for restatement as to whether on October 5, 1912, the Tonypandy County Working Men's Club and Institute was a bona fide club, and also that he might give his reasons (1.) for finding whether it was or was not on that day a bona fide club, and (2.) why he came to the conclusion that the sale of liquor on that day was an illegal sale. In obedience to this order the magistrate restated the case as follows:—

"1. I found that on October 5, 1912, the said club was not conducted in good faith as a club or in other words was not a bona fide club, and my reasons for so finding were as follows: That the club was not on that date a bona fide club was admitted by the appellants under the following circumstances. On the

hearing by me of the information against the appellants on December 19, 1912, counsel for the respondent opened his case by referring to the order made by two of His Majesty's justices of the peace for the said petty sessional division in the case of the respondent Edwards against the said club on November 28, 1912, whereby it was ordered that the said club be struck off the register (copy of which order was attached to and forms part of the case stated by me herein), and counsel stated that according to the judgment given in the said case the grounds on which the said order were founded was that the said justices found as a fact that (i.) the said club was on October 5, 1912, not conducted in good faith as a club, and that (ii.) there was frequent drunkenness on the premises of the said club. He then proceeded to detail the evidence which he proposed calling in order to prove these findings of facts, whereupon counsel for the appellants stated that he was prepared to shorten the case by admitting as proved the findings of the said justices as to the grounds on which they had made their order of November 28, 1912, inasmuch as his submission was that as the club had been registered and was on October 5, 1912, still on the register there had been no illegal sale of intoxicating liquor on that day even though admittedly the club was on that day not a bona fide club and there had been frequent drunkenness on the premises. The course suggested by counsel for the appellants was agreed to by counsel for the respondent and assented to by myself. Inasmuch as the application for striking the club off the register had not been made before myself, I however intimated that I desired to have some evidence as to the general arrangements of the club and the manner in which it was conducted, and thereupon the facts which are set out in . . . . the original case stated by me herein were admitted or proved in evidence before me. In view of the facts set out in sub-paragraphs (*d*), (*e*), (*f*), (*g*), (*h*) and (*i*) . . . . I came to the conclusion that the club was not being conducted for any of the objects professed and stated in its rules, namely, 'to afford to its members the means of social intercourse, mutual helpfulness, mental and moral improvement, and rational recreation,' but that its sole object was to provide means for its frequenters

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(irrespective of whether they were duly elected members or not) to purchase intoxicating liquor in a place other than in a licensed house and during prohibited hours. On the said October 5, 1912, when the police entered the premises each of the fifty-nine persons who were present was provided with intoxicating liquor and none of them were engaged in reading or in any recreational games, while the fact that out of the said total of fifty-nine persons six were drunk and five (including the vice-chairman of the club) were under the influence of drink led me to the conclusion that there was no bona fide effort on that day to realize the professed objects of the club and that all those who were present well knew at the time that the club was not being conducted as a bona fide club. I also inferred from the facts set out in sub-paragraphs (*h*) and (*i*) . . . . that the condition of things when the police entered was of common occurrence in the club and was in no way exceptional.

"2. The reason why I came to the conclusion that the sale of liquor at the club on October 5, 1912, was illegal was as follows: I found as a fact that the intoxicating liquor with which each person present was provided when the police entered on October 5, 1912, had been supplied by or on behalf of the steward in consideration of payments in money made to him as more fully set out in paragraph 3 of the supplemental case stated by me herein. I held that such a transaction constituted a sale by retail of such intoxicating liquor, and as the club was not a bona fide club but was conducted solely for the purpose of enabling the frequenters of the club (whether duly elected members or not) to purchase intoxicating liquor in a place other than in a licensed house and during prohibited hours, I held that the registration of the club afforded no protection to the appellants against the provisions of the Licensing (Consolidation) Act, 1910."

George Elliott, K.C. (*A. T. James* and *Clive Lawrence* with him), for the appellants, cited *Graff* v. *Evans* (1), *Newell* v. *Hemingway* (2), and *Williamson* v. *Morris*. (3)

The respondent did not appear.

(1) 8 Q. B. D. 373. (2) (1888) 58 L. J. (M.C.) 46.
(3) [1899] 1 Q. B. 7.

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BANKES J. I regret that the respondent is not represented, as this case raises an important point. In December, 1912, proceedings were taken before a stipendiary magistrate against a number of persons being officers and members of the Tonypandy County Working Men's Club and Institute for breach of s. 65 of the Licensing (Consolidation) Act, 1910, in selling intoxicating liquor without having a justices' licence authorizing them as therein provided. The magistrate has supplemented his original findings, and as the result of the three cases stated I have come to the conclusion that this working men's club and institute was a real club and not a sham or a mere name. It was an association of persons under rules which are annexed to and form part of the case and provide for the formation of the club consisting of ordinary and honorary members. The rules are numerous. Two of them are material, namely, rules 14 and 25, which refer to the property of the club. Rule 25 provides that all moneys received on account of the club are to be applied towards carrying out the objects of the club or invested by the trustees of the club as therein provided. By rule 14 all the property of the club is to be vested in trustees representing and acting for the whole of the members of the club. It was competent for the magistrate to find that there was no real club carried on under these rules, but he has not so found. He has found that there was a club, but that it "was not conducted in good faith as a club or in other words was not a bona fide club." I take that to mean that the club was a bona fide association, but that it was not conducted in accordance with the rules. The second case shows that to be the meaning of the finding. The magistrate there says that the intoxicating liquor "formed part of the general property of the club and as such was by virtue of rule 14 vested in the trustees of the club representing and acting for the whole of the members of the club." If the liquor was the property of the club the selling complained of was a transfer by an officer of the club to the members. There is no finding of any supply to non-members. The only question then is whether such a transfer is a sale within the meaning of s. 65. In my opinion it is not. It is merely a distribution of the liquor among the members or a supply of the liquor to the members of the club

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such as is contemplated in s. 91. If so it is not a sale within s. 65. Sect. 91, sub-s. 1, speaks of liquor transferred to or distributed among the members of a club as "supplied" to the members. Sub-s. 2 provides that the registration of the club is not to authorize any "sale" which would otherwise be illegal. Therefore if a sale as distinguished from a supply of intoxicating liquor takes place on the premises of a club no matter how genuine, old established, or well conducted, that transaction is not protected by the mere registration of the club. In my view what took place in the present case was a supply and not a sale of intoxicating liquor, and the magistrate was wrong in coming to the conclusion stated in paragraph 2 of the last case that the transaction constituted a sale and that the registration of the club afforded no protection to the appellants against the provisions of the Licensing (Consolidation) Act, 1910. Nothing I have said would affect the case where there is no real association of persons owning the liquor. If a number of persons under the name of a club combine together for the purpose of selling intoxicating liquor to others who until payment have no property in it, that would be a sale and would be within the penal sections of the Act. For these reasons I think the appeal should be allowed.

AVORY J. On the facts proved I think the magistrate might have come to the conclusion that there was a sale of intoxicating liquor such as is prohibited by s. 65; and I am by no means sure that the result at which we have arrived is not due to the magistrate having given the wrong reasons for his judgment. If he had put it upon other grounds I think it might have been supported. In the last return he made to this Court he said: "I found as a fact that the intoxicating liquor with which each person present was provided . . . . had been supplied by or on behalf of the steward in consideration of payments in money made to him as more fully set out in paragraph 3 of the supplemental case stated by me herein. I held that such a transaction constituted a sale by retail of such intoxicating liquor, and as the club was not a bona fide club"—a conclusion at which I think he might have arrived—"but was conducted solely for the purpose of enabling the frequenters of the club (whether duly elected

members or not) to purchase intoxicating liquor in a place other than a licensed house and during prohibited hours, I held that the registration of the club afforded no protection against the provisions of the Licensing (Consolidation) Act, 1910." If the only finding had been that this club was conducted solely for the purpose of enabling the frequenters of the club, whether members or not, to purchase intoxicating liquors in a place other than a licensed house, &c., no fault could have been found with the conclusion that these were sales within s. 65 of the Act, and the magistrate might have come to that conclusion. But that is not the only finding. In answer to a question submitted to him by this Court the magistrate found that the intoxicating liquor formed part of the general property of the club and as such was by virtue of rule 14 vested in the trustees of the club representing and acting for the whole of the members of the club. That is to say that the liquor said to have been sold in this case was the property of the members of the club to whom it was supplied. If so, *Graff* v. *Evans* (1) is an authority that such a transaction is not a sale within the meaning of s. 65. As soon as the magistrate came to that conclusion there was an end of the case. He might have found that the rules were a mere blind to cloak an illegal sale of intoxicating liquors, that there was no vesting of property in the members or trustees as representing the members. If that had been so the conclusion of the magistrate would have been open to no objection; but in face of his finding that the liquor was the property of the members, which is not wholly consistent with some of the later findings, we must come to the conclusion that the appeal should be allowed.

LUSH J. In order to justify a conviction a sale by retail of intoxicating liquor must bo shown. The question is whether the facts establish such a sale. In my opinion there was no sale within the meaning of s. 65. If this had been a bona fide club it is clear that no sale could have been proved, because *Graff* v. *Evans* (1) decided that where the members of a bona fide club are the owners of the liquor consumed, which is merely distributed among them, that distribution is not a sale. The same result

(1) 8 Q. B. D. 373.

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seems to me to follow where the club is not a bona fide club. No doubt under s. 95, sub-s. 1 (*b*), a club may be struck off the register if it is not conducted in good faith as a club; but that consideration cannot affect the question whether there was a sale or merely a distribution of the liquors consumed by the members. If there was a club whose members owned the liquors consumed there was distribution as opposed to sale of those liquors no matter how the club was conducted. Another penalty is imposed by s. 93 of the Act if a club is taken off the register and any intoxicating liquor is supplied or sold to a member on the premises of an unregistered club. The mere fact that intoxicating liquor is supplied is an offence. In my opinion that which was established in *Graff* v. *Evans* (1) in the case of a bona fide club is equally true in the case of a club which is not bona fide, and when it was found that the liquor consumed by the members was the general property of the club the magistrate ought to have dismissed the summonses. I agree, therefore, that the appeal must be allowed.

Appeal allowed.

Solicitors for appellants: *Wrentmore & Son, for Spickett & Sons, Pontypridd.*

NOTE.—Among the rules of the club were the following:—

"1. The society is a working men's club and shall be called 'The Tonypandy County Working Men's Club and Institute' (hereinafter called the club) and its registered office shall be at 57 and 58, Primrose Street, Tonypandy, in the county of Glamorgan . . . .

"The objects of the society are to afford to its members the means of social intercourse, mutual helpfulness, mental and moral improvement, and rational recreation . . . .

"2. The club shall consist of—

"(i.) Ordinary members (Rule 3);

"(ii.) Honorary members being associates of the Working Men's Club and Institute Union, Limited.

"3. A candidate for election must be proposed and seconded by two financial members (2), able from personal knowledge to vouch for his repectability and fitness to be a member. An entrance fee of 2*s.* 6*d.* must be paid by the candidate on nomination, to be returned in the event of his

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(1) 8 Q. B. D. 373.

(2) Financial members appear to be those whose subscriptions were not in arrear.

not being elected. The election shall be by the committee, and no candidate shall be elected who is under 21 years of age. The name, address, and occupation of the candidate, with the name of his proposer and seconder, shall be posted in the club for at least seven days before the day on which his name is submitted for election . . . .

"4. The subscription shall be 4*s.* per annum . . . ."

Rule 6 applied to honorary members. Such members were to have the same rights and privileges and be subject to the same rules as ordinary members, except that they were not to vote at any meeting of the club, be supplied with exciseable liquors for consumption off the club premises, take books out of the library, or introduce visitors.

By rule 8 the managing committee was to consist of the president, vice-president, treasurer, three trustees, and nineteen ordinary members. The committee were to control the management of the club, to purchase such articles, and do all such things as they might deem necessary for carrying out the objects of the club. They were not to "enter into any bond or agreement binding the club to purchase exciseable articles or goods from any person or persons, or in any way part with its absolute control and that of the club members over the supply of exciseable articles to the club (2 Edw. 7, c. 28, s. 28, sub-s. *h*) . . . ."

By rule 13 the officers of the club were to consist of three trustees, a president, vice-president, treasurer, and secretary, all elected as therein provided.

Rule 14 was as follows: "All the property of the club shall be vested in the trustees representing and acting for the whole of the members of the club."

By rule 25, "All moneys received on account of the club from any source shall be applied or invested towards carrying out the objects of the club or shall be invested by the trustees in such ways and upon such of the following securities as the committee or the majority of the members at a general meeting may decide:—

"I. In the Post Office Savings Bank;

"II. In the public funds" &c.

Rule 28. "Members must accompany guests introduced by them during the period of their stay in the club. If at any time exciseable articles shall be provided on the club premises, then, should any visitor of the club not being a member thereof, or an honorary member (rule 6), pay for refreshments served to him, he shall at once be removed from the club premises, and the member introducing such visitor shall be expelled from membership on the fact being duly proved . . . ."

W. H. G.

1914
July 22.

PURCHASE *v.* LICHFIELD BREWERY COMPANY.

Landlord and Tenant—Agreement for Lease—Assignment by Deed—No Entry by Assignee—Privity of Contract—Privity of Estate—Liability of Assignee for Rent.

A tenant of a house under an agreement for a term of years purported to assign the term by deed to assignees who accepted the assignment but never executed the deed and never took possession of the premises:—

Held that, there being no privity of estate and no privity of contract between the landlord and the assignees, the latter were not liable to the former for rent.

Williams v. *Bosanquet* (1819) 1 Brod. & B. 238 distinguished.

APPEAL from the Herefordshire County Court.

By an agreement in writing not under seal, dated October 27, 1908, the plaintiff agreed to let to one Lunnis a house in Eign Street, Hereford, for a term of fifteen years at the yearly rent of 180*l.* payable quarterly. The agreement contained a stipulation against assigning the term without the consent of the plaintiff, which, however, was not to be unreasonably withheld. On October 28, 1908, Lunnis purported by way of assignment and by means of an indenture duly sealed to mortgage to the defendants the term the subject of the agreement. The defendants accepted the assignment, but did not execute the indenture or take possession of the premises.

The plaintiff brought an action against the defendants for rent alleged to be due from them as assignees of the term. The defendants contended that never having gone into possession they were not liable for rent.

The county court judge on the authority of *Williams* v. *Bosanquet* (1) gave judgment for the plaintiff.

The defendants appealed.

Foà (*Farrant* with him), for the defendants. The county court judge was wrong. The defendants could only become liable to perform the terms of the agreement of October 27, 1908, by privity of contract or by privity of estate. Here there

(1) 1 Brod. & B. 238.

is no privity of contract. The defendants were not parties to the original agreement, nor have they ever entered upon the demised premises so that a new agreement between them and the plaintiff might be inferred on the principle of *Buckworth* v. *Simpson* (1) and *Cornish* v. *Stubbs* (2): see *Manchester Brewery Co.* v. *Coombs* (3); and the assignment of October 28 created no privity, because the assignment of a parol tenancy does not pass even the benefit of the stipulations in the agreement: *Elliott* v. *Johnson* (4); still less does it transfer the burden of those stipulations. Neither was there any privity of estate because, the agreement of October 27 not being under seal, no estate passed to Lunnis, who, having no estate, could pass no estate to the defendants even by an instrument under seal. In the case of *Williams* v. *Bosanquet* (5), on which the county court judge based his judgment, there was present the very privity of estate which is wanting in the present case. There the original lease was by deed and so an estate passed to the lessee—*Ward* v. *Lumley* (6)—and from him to his assignee. [They also cited *Noyes* v. *Pollock.* (7)]

S. R. C. Bosanquet, for the plaintiff. The argument for the defendants ignores the effect of the Judicature Acts as explained by the cases of *Walsh* v. *Lonsdale* (8) and *Swain* v. *Ayres.* (9) Since those Acts Lunnis must be treated as a lessee under a lease by deed: *In re Maughan, Ex parte Monkhouse.* (10) That brings the present case within *Williams* v. *Bosanquet.* (5) Being lessee under a lease Lunnis assigned the lease to the defendants. Thereupon by privity of estate, apart from entry or payment of rent, they became liable to perform the obligations of the lease which run with the land, including the obligation to pay rent. Furthermore, specific performance of an agreement for a lease may be decreed at the suit of an assignee of the agreement, upon the condition, if necessary, that his assignor, the tenant under the agreement, shall join in the lease for the purpose of

(1) (1835) 1 C. M. & R. 834.
(2) (1870) L. R. 5 C. P. 334.
(3) [1901] 2 Ch. 608.
(4) (1866) L. R. 2 Q. B. 120.
(5) 1 Brod. & B. 238.
(6) (1860) 5 H. & N. 87, 656.
(7) (1886) 32 Ch. D. 53.
(8) (1882) 21 Ch. D. 9.
(9) (1888) 21 Q. B. D. 289.
(10) (1885) 14 Q. B. D. 956.

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securing performance of the lessee's covenants: *Dowell* v. *Dew* (1); Fry on Specific Performance, 5th ed., pp. 103, 106. There is no reason why similar relief should not be granted against an assignee.

Foà in reply. The doctrine of *Walsh* v. *Lonsdale* (2) is strictly limited in its application. It only applies as between the parties to the agreement sought to be enforced and does not extend to third parties: see per Farwell J., *Manchester Brewery Co.* v. *Coombs.* (3) Assuming that the doctrine had the extensive operation claimed for it, specific performance of an agreement for a lease would not be decreed as a matter of course either for or against an assignee where the agreement contains a clause against assigning without leave, even if the leave is not to be unreasonably withheld. There passed by the assignment of October 28 not an estate but merely such right as Lunnis had to specific performance of the agreement of October 27.

HORRIDGE J. By an agreement in writing purporting to be by way of lease the plaintiff or his predecessor purported to grant to Lunnis a tenancy for fifteen years at a rent of 180*l.* a year. That document was not under seal and therefore by s. 1 of the Statute of Frauds and s. 3 of the Real Property Act, 1845 (8 & 9 Vict. c. 106), it could not take effect as a lease for a term of years. It has been properly treated as an agreement for a lease. The day after this agreement was signed Lunnis mortgaged his interest under it to the defendants, not by way of sub-demise but by way of assignment. The defendants therefore are in the position of mortgagees who have not gone into possession. Two acts are relied on by Mr. Bosanquet as showing that the defendants had gone into possession, first that they advertised a sale of the mortgagor's interest, and secondly that they applied in their own names for a renewal of the licence so that they might get compensation as for a licensed house. Neither of these acts afford any evidence of an attornment or taking of possession; therefore unless Mr. Bosanquet can establish that the mere fact of taking an assignment by deed of an

(1) (1843) 12 L. J. (Ch.) 158. (2) 21 Ch. D. 9.
(3) [1901] 2 Ch. 608, at p. 617.

agreement for a lease makes a mortgagee liable for the rent he cannot uphold the judgment of the county court judge. He contends that Lunnis would on the authority of *Walsh* v. *Lonsdale* (1) have been entitled to say that he was in the same position as if he had got a lease, because he was entitled to a decree for specific performance of the agreement for a lease; he says that the assignees of Lunnis were entitled in the same way to insist on specific performance; that the assignees of Lunnis must therefore be taken to be lessees under a lease and liable for the rent reserved by it. Assuming that Lunnis was in a position to have enforced specific performance against the plaintiff and had the right to treat himself as being a lessee under the lease which would have been granted under a decree for specific performance, still it does not follow that his assignee is in the same position. The only case cited to establish such a right in an assignee is *Dowell* v. *Dew* (2); but in that case the assignee of the agreement had entered and paid rent and had been recognized as tenant by the owner of the property. Knight Bruce V.-C. said that the agreement was assignable "and especially with the assent of the landlord for the time being." In that case there was privity of contract. Even then the landlord was entitled if he thought fit to insist on the personal liability of his lessee on the covenants in the lease as if it had been granted to him. Such a case as the present one seems remote from the case which Jessel M.R. was considering when he said, in *Walsh* v. *Lonsdale* (3), "There is an agreement for a lease under which possession has been given. Now since the Judicature Act the possession is held under the agreement . . . . The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance." In my opinion an assignee of a mere agreement for a lease who never took possession and never attorned tenant could not before the Judicature Acts and cannot now in his own right enforce specific performance against the landlord. He could not establish such a direct relation between himself and

(1) 21 Ch. D. 9. (2) 12 L. J. (Ch.) 158.
(3) 21 Ch. D. 9, at p. 14.

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Horridge J.

the landlord as would induce a Court of Equity, regarding that as done which ought to be done, to treat him as a person in whom a lease had been vested. I do not think that the case of *Williams* v. *Bosanquet* (1) applies because in that case the lease was under seal and it was validly assigned by deed to the mortgagees.

LUSH J. I am of the same opinion. The only point which the county court judge decided was that the present case was governed by *Williams* v. *Bosanquet.* (1) In my view that case does not apply. The lease in question there was under seal. It was assigned by deed to mortgagees. That was a valid assignment. The only question was whether the mortgagees, not having taken possession, were bound by the covenants in the lease. It was held that they were bound. In this case there was no lease under seal. No term was created as between lessor and lessee. Therefore the question decided in *Williams* v. *Bosanquet* (1) does not arise in this case. Consequently the judgment of the county court judge cannot stand on the grounds on which he has based it.

Then can the judgment be supported on other grounds? I do not think it is necessary to say how the case might have stood if the defendants had ever taken possession. They are liable, if at all, on the principle of *Walsh* v. *Lonsdale.* (2) In that case the tenant was in possession under the agreement. In the present case the defendants never did take possession. The agreement contained a provision against assigning. The defendants were only mortgagees. It does not follow from *Walsh* v. *Lonsdale* (2) that a Court of Equity would decree specific performance against mere mortgagees who only took an assignment by way of security. In my opinion it would leave the parties to their position at law. Accordingly the matter stands thus: A tenant under an agreement, whose only title to call himself a lessee depends on his right to specific performance of the agreement, assigns his right to assignees. The assignees never had a term vested in them because no term was ever created; therefore there was never privity of estate. They never

(1) 1 Brod. & B. 238. (2) 21 Ch. D. 9.

went into possession or were recognized by the landlord; therefore there was never privity of contract. It is impossible that specific performance of a contract can be decreed against a person with whom there is neither privity of contract nor privity of estate. Therefore these assignees are not liable to perform the terms of the agreement and this appeal must be allowed.

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Lush J.

Appeal allowed.

Solicitors for appellants: *Sharpe, Pritchard & Co., for H. Russell & Son, Lichfield.*

Solicitors for respondent: *Metcalfe & Sharpe, for T. H. Matthews, Hereford.*

W. H. G.

[IN THE COURT OF APPEAL.]

C. A.

1914

Oct. 20, 21.

TOFTS *v.* PEARL LIFE ASSURANCE COMPANY, LIMITED.

Insurance, Life—Policy—Policy on Life of Another—Mourning Expenses—Insurable Interest—Contract induced by Fraud—Validity of Policy—Right to have it set aside—Assurance Companies Act, 1909 (9 *Edw.* 7, *c.* 49), *s.* 36, *sub-s.* 2.

By s. 36, sub-s. 2, of the Assurance Companies Act, 1909, "no policy effected before the passing of this Act with a collecting society or industrial assurance company shall be deemed to be void by reason only that the person effecting the policy had not, at the time the policy was effected, an insurable interest in the life of the person assured . . . . if the policy was effected by or on account of a person who had at the time a bona fide expectation that he would incur expenses in connection with the death or funeral of the assured, and if the sum assured is not unreasonable for the purpose of covering those expenses . . . ."

Where a person had, before the passing of the Act, effected a policy such as is described in the above sub-section:—

Held, that the sub-section did not affect his right to claim rescission of the policy on the ground that he had been induced to effect it by the fraudulent representation that he had an insurable interest in the life of the person insured in respect of the expenses therein mentioned.

APPEAL from the decision of a Divisional Court (Bray and Lush JJ.) upon appeal from the Wymondham County Court of Norfolk.

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The action was brought for a declaration that two policies of insurance effected in 1902 by the plaintiff with the defendants on the respective lives of his father and mother were illegal, null, and void, and for a return of the premiums paid with interest thereon amounting to 56*l.* 3*s.* 4*d.*

According to the plaintiff's evidence, which the county court judge accepted as true, in 1902 an agent of the defendants suggested to the plaintiff that he should effect with the defendants two policies of insurance, one on the life of his father and the other on the life of his mother, for 20*l.* each for mourning expenses for himself and his family. The proposal forms and the policies stated that the policies were for funeral expenses The plaintiff continued to pay the premiums due under the policies until December, 1912, when he brought this action, alleging that he had been induced to effect the policies by the fraudulent misrepresentation of the defendants' agent that he had an insurable interest in the lives of his father and mother for mourning expenses and that the policies would be valid for that purpose. The county court judge so found, and he also found that the plaintiff had no bona fide expectation that he would have to pay or contribute towards the funeral expenses of his father or mother. He accordingly gave judgment for the plaintiff. The defendants appealed on the grounds (so far as material), first, that there was no evidence of fraud; and, second, that the policies were made valid by s. 36, sub-s. 2, of the Assurance Companies Act, 1909. (1)

(1) 9 Edw. 7, c. 49, s. 36: "(1.) Amongst the purposes for which collecting societies and industrial assurance companies may issue policies of assurance there shall be included insuring money to be paid for the funeral expenses of a parent, grandparent, grandchild, brother, or sister.

"(2.) No policy effected before the passing of this Act with a collecting society or industrial assurance company shall be deemed to be void by reason only that the person effecting the policy had not, at the time the policy was effected, an insurable interest in the life of the person assured, or that the name of the person interested, or for whose benefit or on whose account the policy was effected, was not inserted in the policy, or that the insurance was not one authorised by the Acts relating to friendly societies, if the policy was effected by or on account of a person who had at the time a bona fide expectation that he would incur expenses in connection with the death or funeral of the assured, and if the sum assured is not un-

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In the Divisional Court Bray J. held that there was evidence of fraud, and that the Act did not take away the right of action to rescind the policies on the ground of fraud. Lush J. held that there was no evidence of fraud; and that, if there was evidence of a fraudulent representation as to insurable interest, mourning expenses came within the words of s. 36, sub-s. 2, "expenses in connection with the death of the assured," that the plaintiff had got what he contracted for, and that the policies were made valid by the Act. The learned judges differing in opinion, the judgment of the county court was affirmed. The defendants by leave appealed.

Sir Edward Carson, K.C., and *Rawlinson, K.C.* (*Edmond Browne* with them), for the defendants. There was no evidence upon which the county court judge was entitled to find that the plaintiff had been induced to effect the policies by the fraudulent representation of the defendants' agent that the plaintiff had an insurable interest in the lives of his father and mother for mourning expenses.

Secondly, if there was such evidence, the effect of s. 36, sub-s. 2, of the Assurance Companies Act, 1909, has made the policies valid. Sect. 36, sub-s. 1, of the Act makes valid future policies of insurance in respect of the funeral expenses of certain near relations. Sub-s. 2 deals with policies made before the passing of the Act, of which a great number were then in existence, to cover funeral and other expenses connected with the death of the assured, such as mourning expenses. Mourning expenses come within the words "expenses in connection with the death of the assured" in s. 36, sub-s. 2, and the sub-section has made the policies valid. The Act has made the representation as to insurable interest a valid representation. It is no longer a misrepresentation, and the original misrepresentation has become an immaterial one. The defendants after the Act could not have set up that there was no insurable interest, and the assured is also bound. The plaintiff has got what he

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reasonable for the purpose of covering those expenses, and any such policy shall enure for the benefit of the person for whose benefit it was effected or his assigns."

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contracted for, namely, a valid policy for mourning expenses, and has suffered no damage, and he cannot now claim to rescind the policy and to recover the premiums paid. The plaintiff relies upon some observations of Lord Alverstone C.J. and Sir Samuel Evans in the unreported case of *Johnson* v. *Refuge Assurance Co.* (1) in the Court of Appeal, that the Act does not apply to a policy obtained by fraud, but in that case the plaintiff intended to take out a policy on the life of his father whereas the policy purported to be taken out by the plaintiff's father on his own life. The plaintiff there did not get what he bargained for, and the Act could not validate such a policy. The representation in the present was as to insurable interest which the Act has cured, and the plaintiff has got what he bargained for. [*Barnes* v. *London, Edinburgh, and Glasgow Life Insurance Co.* (2), *Harse* v. *Pearl Life Assurance Co.* (3), *Pearl Life Assurance Co.* v. *Johnson* (4), and *Refuge Assurance Co.* v. *Kettlewell* (5) were also referred to.]

W. E. Hume-Williams, K.C., and *A. W. F. Bagge*, for the plaintiff, were not called upon.

BUCKLEY L.J. [After stating the facts and coming to the conclusion that there was evidence upon which the county court judge was entitled to find that the plaintiff was induced to effect the policies by the fraudulent misrepresentation of the defendants' agent that the policies would be valid for mourning expenses, the learned judge continued:] It is said that, though the policies were obtained by the fraudulent representation that the plaintiff had an insurable interest for mourning expenses, s. 36, sub-s. 2, of the Assurance Companies Act, 1909, has made them valid as from the date of the passing of the Act. Sect. 36, sub-s. 1, contains a provision, as regards future policies, that collecting societies and industrial assurance companies may issue policies insuring money to be paid for the funeral expenses of certain near relations, including parents. Sub-s. 2, which is applicable here,

(1) January 15, 1913. A transcript of the shorthand notes of the judgments in the case was before the Court.

(2) [1892] 1 Q. B. 864.

(3) [1903] 2 K. B. 92; [1904] 1 K. B. 558.

(4) [1909] 2 K. B. 288.

(5) [1908] 1 K. B. 545; [1909] A. C. 243.

deals with the past. [The learned judge read the sub-section.] It is said that each of these policies comes within the words of that sub-section, and is now not void by reason of the plaintiff not having had, at the time when it was effected, an insurable interest, if he had a bona fide expectation that he would incur expenses in connection with the death of the assured. I will assume that that is so; that these policies would, apart from fraud, have become valid policies as from the date of the passing of the Act. The county court judge has found that the plaintiff had no such bona fide expectation, and that of itself would be an answer to the defendants' contention upon the Act. However I pass that by, because there is another answer which renders it unnecessary to consider it. In my opinion the effect of the sub-section is that in consequence of the words "by reason only" there is removed the objection to such a policy which arises from the state of facts being such as is described in the sub-section. But nowhere does the sub-section say that, if a policy is capable of being attacked on the ground of fraud,—not simply on the ground of want of insurable interest—such a right of action is taken away. The statute does not deal with the right of action arising from fraud.

In the case of *Johnson* v. *Refuge Assurance Co.* (1) in this Court Lord Alverstone C.J. and Sir Samuel Evans have expressed opinions which, though they may not be binding upon us as perhaps not necessary for the decision of the case, are in consonance with the view I have expressed. Lord Alverstone said: "In my opinion, to bring a policy of this kind within the statute it must be a policy that has not been obtained by fraud. It must be an honest and bona fide policy." The policy in that case was a policy intended to be effected by the son upon the life of his father. It purported, however, to have been effected by the father when in point of fact it had not. The words which I have read from the judgment of Lord Alverstone import this, that a policy of the kind of which he was speaking might have been brought within the statute under certain circumstances, and Lord Alverstone said that to bring a policy within the statute it must be one not obtained by fraud. Sir Samuel Evans said:

(1) Not reported.

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Buckley L.J.

"I want to say one word on the defence raised on the Assurance Companies Act of 1909, s. 36, sub-s. 2. In my view once you have a case of this kind with a policy obtained, as it is shown now this policy was obtained, by false misrepresentation, putting it shortly, by fraud, this section of the Act of Parliament has no application whatsoever." In my opinion the statute has no effect upon the right of the plaintiff to sue in fraud to set aside the policies.

The appeal must be dismissed.

PHILLIMORE L.J. I agree. [After stating that there was evidence upon which the county court judge could come to the conclusion that the plaintiff was induced to enter into the contracts by the fraudulent representation of the defendants' agent that there was a good insurable interest, the learned judge continued:] Sect. 36, sub-s. 2, of the Assurance Companies Act, 1909, enables a plaintiff in certain circumstances to recover on a policy of insurance notwithstanding that he had not an insurable interest at the time when the policy was issued. I do not intend to deal with the question whether or not in this particular case these policies are brought within the language of the statute, that is to say, whether mourning expenses are "expenses in connection with the death of the assured," or whether the sum assured was or was not unreasonable, or the like. I assume for the purposes of this case that these policies would be made valid by s. 36, sub-s. 2, apart from fraud.

Assuming that they would be, the plaintiff is not thereby deprived of his right to say that he was induced to enter into the policies by fraud, that the policies are therefore voidable at his instance, and to claim rescission and repayment of the premiums which he has paid. The appeal must be dismissed.

PICKFORD L.J. agreed.

Appeal dismissed.

Solicitors for plaintiff: *Wild & Collins, for Joseph, Steward & Pretty, Norwich.*

Solicitor for defendants: *J. M. Storer, for J. W. C. Daynes, Son & Keefe, Norwich.*

W. F. B.

LLOYD, Appellant *v.* THE TOWN CLERK OF SHREWSBURY, Respondent.

1914
Nov. 12.

Registration of Voters — Municipal Franchise — Burgess — Residence within Seven Miles of Borough—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 9, *sub-s.* 2 (*c*).

By s. 9, sub-s. 2, of the Municipal Corporations Act, 1882, a person shall not be entitled to be enrolled as a burgess unless he has during the whole of the twelve months last preceding July 15 resided in the borough, or within seven miles thereof:—

Held, that a claimant is properly qualified in point of residence if he has resided for the whole of the twelve months within the borough, or for the whole of the twelve months within seven miles of the borough, or for part of the twelve months within the borough and for the residue thereof within seven miles of the borough.

Case stated by a revising barrister.

By s. 9, sub-s. 2, of the Municipal Corporations Act, 1882, a person shall not be entitled to be enrolled as a burgess unless he (*a*) is of full age; and (*b*) is on July 15 in any year, and has been during the whole of the then last preceding twelve months, in occupation, joint or several, of any house, warehouse, counting-house, shop, or other building in the borough; and (*c*) has during the whole of those twelve months resided in the borough, or within seven miles thereof. There are other conditions of qualification which are not material to this case.

The special case was as follows:—

"1. At a Court held on September 11, 1914, and by adjournment on September 30, 1914, before me, John William St. Lawrance Leslie, barrister-at-law, duly appointed to revise the lists of municipal voters or burgesses of the municipal borough of Shrewsbury, George Butler Lloyd, the above-named appellant, who is member of Parliament for the borough of Shrewsbury and also an alderman of the said borough, duly claimed that his named should be inserted in the list of municipal voters or burgesses of the said borough in the Stone ward thereof.

"2. I disallowed the said claim on the ground that as it appeared to me the appellant has not resided in the said borough or within seven miles thereof for the whole of the twelve months

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prior to July 15, 1914, as required by section 9 (2.) (*c*) of the Municipal Corporations Act, 1882. This was the only question as to which there was any dispute before me in regard to the said claim.

"3. The appellant for many years prior to March 25, 1914, had occupied as tenant and resided at Shelton Hall, a house which is not within the borough of Shrewsbury, but is within seven miles thereof.

"4. In March, 1914, the appellant sub-let Shelton Hall furnished as from March 25, 1914, to a sub-tenant for one year certain and thereafter from year to year, such sub-tenancy being determinable after March 25, 1915, by six months' notice on either side.

"5. The appellant gave up possession of Shelton Hall on March 25, 1914, and thereafter ceased to reside there.

"6. In view of his approaching departure from Shelton Hall the appellant before March 25, 1914, arranged with his sisters, who reside at 2, Quarry Place, in the borough of Shrewsbury, that they should give him the sole use of a large double bedroom in their said house which he should be entitled to use whenever he liked.

"7. By this arrangement the said room is reserved for the use of the appellant and his wife or of his daughter if she desires to use it during their absence. For this accommodation the appellant pays his sisters 10*l.* per annum, payable yearly, and he also pays for his board during such time as he actually occupies the room.

"8. On leaving Shelton Hall in March, 1914, the appellant removed to this room various personal belongings such as great coats, dressing case, fishing rods, &c., and he and his wife keep all their clothing there except such articles as they require from time to time for use elsewhere.

"9. The appellant first slept in this room in pursuance of the said arrangement during the week end beginning on Friday March 27, 1914, and he thereafter occupied it for the majority of the week ends up to the middle of July, 1914, probably for about twelve week ends out of the sixteen during that period. Besides these week ends the appellant also used the room for the

whole of the week at the beginning of July, 1914, during which the Royal Agricultural Show visited Shrewsbury.

"10. For the purpose of his attendance in Parliament the appellant while resident at Shelton Hall was accustomed to stay in hotels or in rooms from time to time in London. For instance in February, 1914, and until Easter, 1914, he occupied furnished apartments in Bury Street, St. James's. From the middle of April, 1914, till the middle of August, 1914, he rented a furnished flat in London which he occupied together with his wife and daughter. The Easter vacation of 1914 he spent on a visit to his brother in Devonshire.

"I attached no importance as against the appellant to the circumstances stated in this paragraph as it appeared to me that the appellant would have required the same or similar accommodation in London if he had continued in the occupation of Shelton Hall. But having regard to the facts stated in paragraphs 3 to 9 hereof I held that the appellant had not resided in the borough of Shrewsbury or within seven miles thereof during the whole of the twelve months preceding July 15, 1914, and I accordingly disallowed his claim.

"If the Court should be of opinion that my decision was wrong the burgess roll of the said borough is to be amended by inserting the name of the appellant therein for the Stone ward of the said borough."

Hugh Fraser, for the appellant.

The respondent was not represented.

DARLING J. For a portion of the qualifying period the appellant lived in his own house, Shelton Hall, which is within seven miles of the borough; for the rest of the qualifying period he had such a right and title to occupy a room as this Court has held sufficient to constitute residence; and the room in which he so resided was in the borough itself.

The revising barrister seems to have taken the view that in order to bring himself within s. 9, sub-s. 2 (*c*), of the Municipal Corporations Act, 1882, a claimant must prove either that he has resided for the whole of the qualifying period within the borough,

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Darling J.

or that for the same period he has resided outside but within seven miles of the borough, and that a composite residence, that is to say a residence for part of the qualifying period within a borough and for the residue of the period within seven miles of the borough, is not sufficient residence to qualify a person to vote as a burgess within s. 9, sub-s. 2 (*c*). In my view that is not the effect of the enactment. The meaning is that, so far as residence is concerned, a claimant is properly qualified if he has resided for the whole of the qualifying twelve months within the borough, or for the whole of the twelve months outside but within seven miles of the borough, or for part of the twelve months within, and for the residue within seven miles of, the borough. The revising barrister therefore came to a wrong conclusion, and this appeal must be allowed.

LUSH and SANKEY JJ. concurred.

Appeal allowed.

Solicitors for appellant: *Gibson & Weldon, for J. C. H. Bowdler, Shrewsbury.*

W. H. G.

[IN THE COURT OF APPEAL.]

C. A.
1914
Oct. 22, 23;
Nov. 16.

WILLS *v.* GREAT WESTERN RAILWAY COMPANY.

Railway—Carriage of Goods—Special Contract—"Owner's risk"—"Non-delivery of any consignment"—Non-delivery of Part of Consignment.

The plaintiff delivered a consignment of goods to the defendants for carriage on their railway, at a reduced rate, upon the terms of a contract signed by him, which provided that the defendants should be relieved from "all liability for loss, damage, misdelivery, delay or detention" unless arising from the wilful misconduct of their servants, but not from any liability they might otherwise incur in the case of "non-delivery of any package or consignment fully and properly addressed," and that "no claim in respect of goods for loss or damage during the transit" should be allowed unless made "within three days after delivery of the goods in respect of which the claim is made, or, in the case of non-delivery of any package or consignment, within fourteen days after despatch."

When the consignment arrived at its destination some of the goods were missing, and the plaintiff made a claim upon the defendants within fourteen days after the despatch of the consignment:—

Held by Buckley L.J. and Pickford L.J., Phillimore L.J. dissenting, that non-delivery of a part of a consignment was "non-delivery" of the consignment within the meaning of the contract, and that the plaintiff was entitled to recover damages.

Judgment of the Divisional Court [1914] 1 K. B. 263 affirmed.

APPEAL from the decision of a Divisional Court (Bray and Lush JJ.) affirming the judgment of the Bristol County Court, reported [1914] 1 K. B. 263.

The plaintiff, who was a meat salesman, brought an action in the county court claiming damages for the non-delivery of certain carcases of frozen mutton, which formed part of three consignments delivered by him to the defendants for carriage from Avonmouth to Lawrence Hill Station, Bristol, to be there delivered to his order. The consignments were despatched on May 17, July 22, and October 23, 1912, respectively. When the consignments arrived at Lawrence Hill Station it was found that the number of carcases was less than the number delivered to the defendants for carriage, four of the first consignment, one of the second, and seven of the third being missing. In the case of each of the first two consignments the plaintiff sent

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to the defendants a claim in writing within fourteen days after the despatch of the consignment, but more than three days after delivery, and in the case of the third consignment within three days after delivery. Each carcase was wrapped in a canvas cover with a mark upon it, and the carcases were placed in refrigerator vans in which no other carcases were placed. Each van had a label with the address upon it attached to it on the outside.

The plaintiff had despatched the consignments at a reduced rate, and had in each case signed an owner's risk consignment note in these terms:—

"Great Western Railway. Consignment note for goods to be carried at reduced rates at owner's risk.

"The Great Western Railway Company hereby give notice that they have two rates for the carriage of the undermentioned goods, at either of which rates the said goods may be consigned, at the sender's option; one the ordinary rate, when the company take the ordinary liability of a railway company; the other a reduced rate, adopted when the sender agrees to relieve the company and all other companies or persons over whose lines the goods may pass, or in whose possession the same may be during any portion of the transit, from all liability for loss, damage, misdelivery, delay or detention (including detention of traders' trucks), except (1.) upon proof that such loss, damage, misdelivery, delay or detention arose from wilful misconduct on the part of the company's servants; (2.) in the case of such non-delivery, pilferage, or misdelivery as is hereunder mentioned.

"To the Great Western Railway Company.

"Receive and forward the undermentioned goods, to be carried at the reduced rate, below the company's ordinary rate, in consideration whereof I agree to relieve the Great Western Railway Company and all other companies or persons over whose lines the goods may pass, or in whose possession the same may be during any portion of the transit, from all liability for loss, damage, misdelivery, delay or detention (including detention of traders' trucks), except upon proof that such loss, damage, misdelivery, delay or detention arose from wilful misconduct on the part of the company's servants. But nothing in this agreement shall exempt the

company from any liability they might otherwise incur in the following cases of non-delivery, pilferage, or misdelivery (that is to say):—

"1. Non-delivery of any package or consignment fully and properly addressed unless such non-delivery is due to accidents to trains or fire.

"2. Pilferage from packages of goods protected otherwise than by paper or other packing readily removable by hand provided the pilferage is pointed out to a servant of the company on or before delivery.

"3. Misdelivery where goods fully and properly addressed are not tendered to the consignee within twenty-eight days after despatch.

"Provided that the company shall not be liable in the said cases of non-delivery, pilferage or misdelivery on proof that the same has not been caused by negligence or misconduct on the part of the company or their servants."

On the back of the consignment note were certain general conditions, which formed part of the contract. Condition 3 was as follows: "No claim in respect of goods, for loss or damage during the transit, for which the company may be liable, will be allowed unless the same be made in writing within three days after delivery of the goods in respect of which the claim is made, such delivery to be considered complete at the termination of the transit, as specified in condition 6, or in the case of non-delivery of any package or consignment within fourteen days after despatch." Condition 6: "The transit shall in no case extend beyond (*a*) the time when goods carted by the company are unloaded or tendered at the address to which they are consigned; (*b*) the expiration of twenty-four hours after notice of arrival of the goods, posted by the company, is due for delivery to the consignee in the ordinary course of post, or notice of arrival is given to him personally or delivered at his address; or (*c*) the expiration of twenty-four hours after the arrival of the goods at the station to which they are consigned whenever the address of the consignee is unknown."

The county court judge (Judge Austin) held that non-delivery of part of a consignment was "non-delivery" within the

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meaning of the contract, and that the plaintiff had fourteen days after despatch of each consignment within which to make the claim; and he found in fact that the consignments were fully and properly addressed, and that the defendants had not proved to his satisfaction that the non-delivery was not caused by negligence or misconduct on the part of their servants. He accordingly held that the defendants were not protected by the terms of the consignment note, and he gave judgment for the plaintiff for 10*l.* 8*s.*, the value of the carcases not delivered.

The Divisional Court affirmed the judgment. (1)

The defendants by leave appealed.

Schiller, K.C., and *C. K. Tatham*, for the defendants. This form of consignment note, under which the goods are carried at a reduced rate at owner's risk, owes its origin to s. 7 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), and is intended to meet the liability imposed on a railway company by that section. That section speaks of the liability "for the loss of or for any injury done to" any goods. The words "loss of" there mean the loss of the goods. "Loss" in this consignment note is used in that sense, and therefore includes a non-delivery of part of a consignment. So far the defendants are protected from liability, no attempt having been made to prove that the loss arose from misconduct of the defendants' servants. Then come the three exceptions, which did not appear in the old form of consignment note, and which have been added as a protection to the goods owner. The words in exception 1, "non-delivery of any consignment," mean non-delivery of the entire consignment. Non-delivery is the antithesis to delivery, just as non-existence is the antithesis to existence, and means non-delivery of the whole consignment, that is, total failure to deliver. Non-delivery of part of the consignment is therefore not "non-delivery" of the consignment within the meaning of this note; it comes within the word "loss" in the earlier part of the note. The words "loss" and "non-delivery" in condition 3 on the back of the note bear those meanings. This reading makes the note consistent throughout. If "non-

(1) [1914] 1 K. B. 263.

delivery" includes non-delivery of a part of a consignment, it is difficult to see to what the word "loss" can apply. The words in condition 3, "after delivery of the goods in respect of which the claim is made," refer to the goods the subject-matter of the consignment, and the claim must be made within three days after delivery of that part of the consignment which is delivered. In the case of non-delivery of part of a consignment the consignee knows his loss at once and must claim within three days. If no part of the consignment is delivered the loss may not be known so soon, and the consignee has fourteen days in which to claim. If "non-delivery" includes non-delivery of a part of a consignment, exceptions 2 and 3 on the face of the note are unnecessary, because where there is pilferage from a package there is non-delivery of part, and mis-delivery of a part is a non-delivery of that part. [*Cockburn* v. *Alexander* (1) was referred to.]

J. F. P. Rawlinson, *K.C.*, and *F. E. Weatherly*, for the plaintiff. "Non-delivery" of a consignment in exception 1 on the face of the note has its ordinary meaning. If part is not delivered the consignment is not delivered. Therefore "non-delivery" includes non-delivery of a part of a consignment. Exceptions 2 and 3 are qualifications of exception 1. "Loss" on the face of the note means any loss other than non-delivery. Condition 3 on the back of the consignment note must be read in the same sense. The words "loss or damage" are distinct from "non-delivery." Loss cannot there refer to non-delivery of a part of a consignment, because in case of "loss" a claim must be made "within three days after delivery of the goods in respect of which the claim is made." That cannot apply to goods which are not delivered. Therefore "non-delivery" in that condition must include non-delivery of a part of a consignment. "Loss" is used in antithesis to "non-delivery." It does not mean "loss of" the goods. Where that is meant the consignment note uses the words "loss of" goods, as in conditions 1, 14, 15, thus following the language of s. 7 of the Railway and Canal Traffic Act, 1854. "Loss" means loss to the owner of the goods. Further, if the language is ambiguous, it cannot be construed

(1) (1848) 6 C. B. 791, at pp. 814, 815.

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as relieving the defendants from liability. [*Curran* v. *Midland Great Western Ry. Co.* (1) was referred to.]

Schiller, K.C., in reply.

Cur. adv. vult.

Nov. 16. BUCKLEY L.J. read the following judgment:—The question for decision is whether the Great Western Railway Company are liable for short delivery in respect of all or some of three consignments made respectively in May, July, and October, 1912. They were consignments from Avonmouth Station to Lawrence Hill, Bristol, of a number of carcases of sheep and lambs. Of the first consignment four sheep were not delivered, of the second consignment one sheep was not delivered, of the third consignment seven sheep were not delivered. Claims were made as regards the first consignment eight days after delivery, as regards the second four days after delivery, and as regards the third two days after delivery.

The principal questions on the appeal are two, namely, first, whether the liability of the railway company extends to short delivery or is confined to the case of complete failure of delivery, and, secondly, whether the claims were made within sufficient time.

The consignments were made upon owner's risk notes. By s. 7 of the Railway and Canal Traffic Act, 1854, the company are liable for loss of or injury done to goods, subject to the proviso contained in that section enabling the company to make conditions being reasonable conditions as there provided. The owner's risk note formerly in use relieved the railway company from liability for loss or damage except upon proof that it arose from wilful misconduct. The owner's risk note in question in this case contains a further exception, and it is upon that that the question arises. In certain cases of non-delivery, pilferage, or misdelivery the company is under this note liable. The former note was one in favour of the company, relieving it from liability except in case of wilful misconduct. This present note adds a liability in the company which was excluded by the previous form, and is in that sense in favour of the consignor.

(1) [1896] 2 I. R. 183.

For the present purpose it suffices to say that, although there is no wilful misconduct, the company is liable under this owner's risk note if there has been "non-delivery of any package or consignment fully and properly addressed unless such non-delivery is due to accidents to trains or fire." Upon the language of this note non-delivery is not, I think, a thing different from but is a thing included within loss. For the note provides that the company shall be relieved from all liability for loss, damage, misdelivery, delay or detention, with an exception in the case of such non-delivery as above mentioned. A subject-matter cannot be excepted from a class unless, but for the exception, it would form a member of the class. Non-delivery therefore must fall within the class of loss, damage, misdelivery, delay or detention. Damage and misdelivery are not appropriate words for the purpose. Delay or detention may be causes which lead to non-delivery, but non-delivery cannot be said to be within them. The remaining word under which it can be included is "loss." Non-delivery is, I think, within this note a particular instance of loss, namely, loss arising to the consignor by reason of the non-delivery of his goods. Loss does not necessarily mean loss of the goods. It may and I think does include loss to the consignor by non-delivery. Thus construed, therefore, the contract provides that the company is relieved from liability for loss (including non-delivery) with the exception of non-delivery of any package or consignment fully and properly addressed unless such non-delivery is due to accidents to trains or fire.

The appellants' contention then is that short delivery is one thing and non-delivery is another, that the decision in the Court below is that short delivery is included in non-delivery, and that this is wrong. They contend that the company's liability is confined to the case of complete failure of delivery. Delivery of the consignment means, they say, delivery of the entirety of the consignment: non-delivery of the consignment is the antithesis to that, and means that the entirety must be the subject of non-delivery. Thus, suppose that the consignment is of thirty bags of wheat, delivery is made when thirty bags are delivered. Non-delivery, the appellants say, is the antithesis of that, and is satisfied only if as regards each and all of the thirty

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bags there is non-delivery; that if none of the thirty are delivered there is, but if twenty-nine are delivered there is not, a non-delivery of the consignment. I am unable to agree that a delivery of twenty-nine is a delivery of thirty. If thirty be the consignment and only twenty-nine are delivered, the consignment has not been delivered, there has been non-delivery of that consignment of thirty. If the question is asked has the consignment of thirty bags of wheat been delivered, the answer (if twenty-nine only have been delivered) must be in the negative. The consignment has not been delivered; there has been non-delivery of the consignment.

But it is contended that upon the particular language of this consignment note the words do not, as matter of construction, bear this plain meaning. For this purpose reliance has been placed upon No. 3 of the general conditions on the back of the note. The language of that condition is as follows: "(3.) No claim in respect of goods, for loss or damage during the transit, for which the company may be liable, will be allowed unless the same be made in writing within three days after delivery of the goods in respect of which the claim is made, such delivery to be considered complete at the termination of the transit, as specified in condition 6, or in the case of non-delivery of any package or consignment within fourteen days after despatch." It is contended that the first part of that clause speaks of a claim in respect of goods for loss, and provides that the claim must be made within three days after delivery of the goods in respect of which the claim is made, i.e., of the lost goods. This, of course, would be nonsense if the words were read in that sense. It follows, they say, that the words must be read as meaning that a claim in respect of goods for loss, being goods part of a larger mass of goods, must be made within three days after delivery of such of the mass of goods as are delivered. If this be so, they say that short delivery falls within the first part of the clause. They then go on to argue that short delivery therefore does not fall within the second part of the clause. From this they say it follows that non-delivery of a consignment does not include short delivery. The answer is, I think, that their construction of the first part of the clause is wrong. Of the two parts of the

clause the former refers to the case where goods have been delivered, the latter to the case where they have not been delivered. The former part contemplates a claim for loss which is to be made after delivery of the goods in respect of which the claim is made. The loss spoken of there must therefore be loss in respect of goods delivered, unless by a strained construction the sentence is to be read as if it were, "after delivery of so much of the goods as is delivered in respect of the undelivered portion of which the claim is made." There is no occasion to resort to this strained construction. This condition 3 is a sort of statute of limitation. There are five heads of liability. They are found on the other side of the note, and are loss, damage, misdelivery, delay or detention. Prima facie the statute of limitation would be expected to extend to cover all the heads of liability, and the third condition can be construed as having that effect if loss means, not loss of the goods, but loss to the consignor by reason of some one of the five matters specifically mentioned on the other side of the note—loss, for instance, by delay, or loss by detention when the company has claimed a lien for a certain time and ultimately abandons it, or loss of any other kind. I read the first part of condition 3 as confined to claims in respect of goods which have been delivered. It names a period of limitation of three days after their delivery, during which time the consignee can examine them and see whether he has suffered any loss in respect of them. The second part then refers to the other case where the goods have not been delivered. There are here found the same words as the relevant words to be construed on the other side of the note, namely, "non-delivery of any package or consignment." Under which words then of the third condition does a case of partial delivery fall? Not under the first part for the reasons which I have given, but under the second part, and non-delivery of the consignment includes non-delivery of part of the consignment. The view, therefore, which I take upon the other parts of the note is borne out by the construction of the third condition.

The facts here are that part of the consignment was not delivered. So far as this point is concerned therefore I think there is liability for non-delivery. Non-delivery does not mean

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that the entirety has been the subject of non-delivery, but means that there has not been delivery of the entirety.

The next point is as regards time, and relates only to the first two consignments. The claim in respect of each of these was made after three days had expired from delivery of so much of the consignment as was delivered. It follows from what I have said already that the relevant provision of the third condition is the latter and not the former part of that clause, and the claim made within fourteen days after the despatch of the goods was in time.

There remain two subsidiary points upon which we did not call upon the respondent's counsel. The first is that to render the company liable the consignment must have been fully and properly addressed. The consignment was of a number of carcases identified upon the consignment notes by marks which were found upon the wrappers in which the carcases were enveloped. The goods were consigned to owner's order, and were put into a truck which the railway company labelled. The label is not forthcoming, but the fact is that the consignment being to Wills, Lawrence Hill, did in fact reach that destination. I entirely agree with what Bray J. said upon this matter. From the evidence the only proper inference is that the consignment was fully and properly addressed.

The remaining point is upon the proviso that the company shall not be liable in the case of non-delivery on proof that the same has not been caused by the company's negligence. Upon this the onus was on the company to prove that there was no negligence. The learned county court judge came to the conclusion that his mind was not satisfied upon that matter. It was for the company to prove it. They failed to prove it to the satisfaction of the judge; it was a question of fact, and upon that question of fact it is not for us to interfere with the findings of the learned judge.

Upon all grounds, therefore, it seems to me that the liability of the railway company is established, and that this appeal fails.

PHILLIMORE L.J. read the following judgment:—There is only one point in this case which gives me any trouble. As

regards all the others I have no difficulty in agreeing with the decisions of the learned county court judge, whose death we so much regret, and of the Divisional Court.

The one point of difficulty concerns the meaning of the word "non-delivery" in the railway consignment note which we have to construe.

The facts which gave rise to the case are that three consignments from Avonmouth to Lawrence Hill, Bristol, of carcases of mutton, amounting to 320 in the first case, 500 in the third, and I do not know that we were told the amount of the second, were entrusted to the railway company for delivery, and that out of the first consignment four, out of the second one, and out of the third seven, were missing when delivery was taken. The plaintiff, who was consignor and consignee, sued for the value of the twelve carcases. The company set up the terms of the consignment note as a defence, but has lost in both Courts.

The Railway and Canal Traffic Act, 1854, by s. 7, makes the company liable for loss of or injury to goods consigned to them, caused by the neglect or default of the company's servants, but enables the company to make special arrangements upon reasonable terms; and for a long time—probably since the passing of that Act—there has been in use what is called an "owner's risk consignment note," by which, in consideration of the reduced rate, the greater part of the risk of carriage was thrown upon the owner.

In the earlier form very little risk was left for the company to bear. The owner agreed to relieve the company from all liability for loss, damage, misdelivery, delay, or detention, except upon proof that it was caused by wilful misconduct on the part of the company's servants. The present form of the note is more favourable to the owner, and throws more risk upon the company, adding a second head of liability which, with its qualifications, requalifications, and conditions precedent and subsequent, forms the intricate provisions some of which we have to consider.

Before proceeding to this I will make a general observation which applies to the consignment note, as well in its older as in its modern form. Being intended to relieve the company from

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some of the provisions of the Railway and Canal Traffic Act, it is unfortunately not in tune, so to speak, with that Act. The Act speaks of liability for loss of or injury to goods. These words do indeed appear in the first of the general conditions on the back of the note, and, with a variation, in the sixteenth; but in the body of the note we have instead the beadroll of five substantives—loss, damage, misdelivery, delay, or detention—and in the other conditions we find "loss or damage" or "loss or damage or delay."

As to these five substantives the new second head of liability which the company undertake is in the case of "such non-delivery, pilferage, or misdelivery as is hereunder mentioned." "Misdelivery" as a separate cause seems to require justification or explanation. One can understand a claim for the goods being lost, for their being damaged, for their being delayed, or for their being detained by the company under some claim of lien. Though delay or detention might ripen into loss, they may be treated as for a time different forms of injury to the owner of the goods; but if he does not get his goods or gets them late, what does it matter to him whether they have been misdelivered to some one else, or whether there has been a confusion and some one else's goods have come to him and his gone to some one else? His claim is because he has not got his goods, they are lost to him as much as if they had been stolen; or, if they are delayed, his damage would be the same, whether the cause of delay is misdelivery or any other cause. The only justification, I think, for inserting this fifth substantive is that, as will appear later, when the non-delivery or delay is due to misdelivery, the company has a longer period in which to rectify the misfortune than it might otherwise have had. The special provision as to pilferage has its bearing upon the meaning of the word "non-delivery," a bearing which I will discuss later.

What we have to determine is whether in this case there was any non-delivery of any package or consignment fully and properly addressed, the further qualification on this clause being unnecessary to discuss.

It was suggested in the course of the argument before us that each of these carcases was a package, and it may be so; but, if

so, as the point was taken that there was an absence of proper address, and as the county court judge only found that the consignment consisting of all the packages was properly addressed, by reason of the label on the truck, there are no materials for deciding this point, and we have to deal with the case as one of suggested non-delivery of a consignment.

It has been truly observed that, where one undertakes to deliver, he cannot claim to have delivered unless he has delivered fully, and that the delivery of, say, 316 carcases is not a delivery of a consignment of 320. But, on the other hand, if you make a positive entity out of a negative, and say that the railway company is liable for a non-delivery, I am not sure that the observation cannot be retorted. He who seeks to prove a non-delivery may have to prove an entire non-delivery; or, in other words, there are three possibilities: delivery, non-delivery, and part or short delivery. But, however this may be in the abstract, what we have to determine is what is the meaning of "non-delivery" in this consignment note.

It may be that the parties have supplied their own dictionary. The company are to be liable in certain cases for non-delivery, pilferage, or misdelivery. If misdelivery is another cause of liability, non-delivery must apparently have some limited meaning. It may be that it is not another cause, but rather a qualification. Pilferage on the assumption that shortage makes a non-delivery is harder to explain. It is just possible that, as non-delivery only applies when the consignment is properly addressed, the clause as to pilferage, highly qualified and restricted as it is, might in a rare instance give a consignor a claim, if he had properly protected his package, but not properly addressed it. But this would be a very rare case.

I now turn to the conditions on the back. Condition 3, read with condition 6, becomes very important. [The Lord Justice read the conditions.] The words used in condition 3 are "loss or damage." "Non-delivery" means a "loss," but no claim is to be made unless within three days after delivery of the goods in respect of which the claim is made or, in the case of non-delivery, fourteen days after despatch.

The second clause of condition 3 is appropriate to a case where

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nothing has arrived, but not very appropriate to a case where 98 per cent. of the goods have been delivered. There is some claim for loss which must be made three days after delivery of the goods in respect of which the claim is made, which may be construed to mean after delivery of the bulk of the goods in respect of which a claim for shortage is made. That there is some claim for loss as well as for damage which can be made after delivery of the goods in respect of which the claim is made appears plain by the first clause of condition 3.

It is suggested that the word "loss" in condition 3 is used in a different sense from that given to it on the face of the document and in the other conditions, and that it means a claim for subjective loss, not loss of goods but loss to owner which might be due by reason of delay. But then the word "loss" in condition 3 would also mean something different from the word "loss" in condition 2, where three times over there is a row of substantives, "loss, damage, or delay." I might also refer to conditions 14 and 15. Loss as there used excludes injury by delay.

It would certainly seem that two events are contemplated in condition 3; one a complete non-delivery of a package or consignment, as to which, in order to avoid unfounded claims and to give the company the opportunity of tracing out a package which had miscarried, the claim must be made within fourteen days after despatch; and, secondly, any claim for damage to the goods or for particular loss or shortage, say, of one bottle in a case of a dozen of wine, or one case in a truckload of cases, in which event the claim is to be made within three days after the goods in the case of damage, or the bulk of them in the case of shortage, have been delivered. There is no particular reason for any time limit as to claims for delay, for the facts would be on record in the company's books; and detention is an a fortiori case; and there may well be no provision for a time limit in these cases.

The argument reduces itself to a narrow compass. On the one hand it may be said—but not, I think, with absolute certainty—that non-delivery in the abstract means non-delivery of any part. On the other hand, if that is the meaning of non-delivery in the body of this consignment note, it seems probable that it has a restricted meaning in condition 3, two different meanings in the

same document; and it seems certain that the word "loss" has a different meaning in the body of the document and condition 2 and in condition 3.

On the whole I conclude that "non-delivery" means absence of delivery, and that shortage only arises as a claim (*a*) when it is made within three days, and (*b*) when it is either due to wilful misconduct, or can be brought under the head of pilferage or possibly misdelivery.

Therefore I think that the appeal succeeds.

PICKFORD L.J. read the following judgment:—This case raises several questions upon what is called an owner's risk consignment note, only one of which, that is, what is the meaning of the words "non-delivery of any consignment," seems to me to present any difficulty.

I do not propose to state the facts of the case, as they are clearly and accurately set out in the judgments of the Divisional Court and of Buckley L.J. and Phillimore L.J.

These owner's risk consignment notes came into existence in consequence of s. 7 of the Railway and Canal Traffic Act, 1854. That section is in these terms, so far as it is necessary to mention them: "Every such company as aforesaid shall be liable for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; . . . . Provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the Court or judge before whom any question relating thereto shall be tried to be just and reasonable." In order to avoid the liability imposed by this section the railway company agrees to carry goods at a rate less than their ordinary rate in consideration of being exempted from some of the obligations imposed by the section.

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The note adopted by the defendants in its original form was more stringent than the present note and ended at the words "on the part of the company's servants" in the first exception. It therefore ran thus: "The Great Western Railway Company hereby give notice that they have two rates for the carriage of the undermentioned goods, at either of which rates the said goods may be consigned, at the sender's option; one, the ordinary rate, when the company take the ordinary liability of a railway company; the other a reduced rate, adopted when the sender agrees to relieve the company and all other companies or persons . . . . from all liability for loss, damage, misdelivery, delay or detention . . . . except upon proof that such loss, damage, misdelivery, delay or detention arose from wilful misconduct on the part of the company's servants"; and the operative part of the agreement followed those words.

It will be noticed that the wording is not quite the same as that of s. 7 of the Railway and Canal Traffic Act, 1854, as, instead of the compendious expression loss of or injury to goods, it uses the words loss, damage, misdelivery, delay or detention; but I do not think the meaning is different. The word "loss" in this note must include non-delivery of goods whether total or partial, and the result was that the defendants were not liable for such non-delivery total or partial except upon proof that it arose from wilful misconduct upon the part of the company's servants.

This was afterwards modified by the introduction of the second exception: "in the case of such non-delivery, pilferage, or misdelivery as is hereunder mentioned." This is stated in the operative part to be: "But nothing in this agreement shall exempt the company from any liability they might otherwise incur in the following cases of non-delivery, pilferage, or misdelivery (that is to say):—1. Non-delivery of any package or consignment fully and properly addressed unless such non-delivery is due to accidents to trains or fire. 2. Pilferage from packages of goods protected otherwise than by paper or other packing readily removable by hand provided the pilferage is pointed out to a servant of the company on or before delivery. 3. Misdelivery where goods fully and properly addressed are not tendered to the consignee within twenty-eight days after despatch.

Provided that the company shall not be liable in the said cases of non-delivery, pilferage or misdelivery on proof that the same has not been caused by negligence or misconduct on the part of the company or their servants."

The question is whether in order to make the company liable there must be a total non-delivery of the consignment, or whether they are liable if a part of the consignment is not delivered.

The meaning with regard to a package is not difficult. If the package be delivered, the company are not liable for the loss of some of its contents, unless it arises from pilferage under the circumstances mentioned. If a package be properly addressed and packed, it is not likely that there would be loss of its contents except from pilferage, and therefore adequate protection seems to be given to the owner of the package. No claim for pilferage is, however, given in the case of a consignment, and, therefore, if non-delivery means total non-delivery, no claim can arise for a loss of part of the consignment, even in the case of pilferage, unless wilful misconduct on the part of the company's servants is proved.

The contention on the part of the defendants is that non-delivery of a consignment means total non-delivery, and that, therefore, they are not liable except in the case of wilful misconduct if they deliver only 25 per cent. of the consignment and 75 per cent. is undelivered, or even in the extreme case put by the Divisional Court of 1 per cent. delivered and 99 per cent. undelivered. I think it better, however, not to take such extreme instances. They may be used in support of the arguments on both sides, and the answer may be that, if the portion delivered or undelivered, as the case may be, is extremely small, it may be negligible and come under the doctrine of de minimis.

This contention is founded in a great measure upon the use of the substantive "non-delivery," and it is argued that this word is a negation of "delivery," just as "non-existence" is a negation of "existence." I do not think this is sound. Non-delivery is, no doubt, opposed to delivery, but delivery of a consignment would not, in my opinion, exist if there were only a delivery of a very small percentage, and, therefore, there would be a non-delivery

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Pickford L.J.

if the words are to be taken as opposed to one another. I do not, however, think that too much importance should be given to the use of the word "non-delivery." I think it may well be only a convenient way of expressing what could be put in a longer form, e.g., the company will be liable in cases where they have failed to deliver a package or consignment, and, so read, it seems to me that they have failed to deliver a consignment if they only deliver a very small percentage of it. Looking, therefore, only at the face of the note, I think that the meaning of the words is more consistent with the contention that non-delivery means non-delivery of the whole consignment, i.e., a failure to deliver the whole and delivery of only a part, than with the contention that it means a total non-delivery of any part of it.

But there are conditions on the back of the note which have to be considered, and the important condition for the purposes of this case is No. 3, which is in these terms: [His Lordship read condition 3.] The transit is defined in condition 6: [His Lordship read condition 6.]

It seems to me clear that "loss" in condition 3 must be read in a more restricted sense than "loss" on the face of the note, as there must be excluded from it non-delivery, whatever that may mean, and both meanings of it are included in the word as used on the face of the note, i.e., both total and partial non-delivery. If the words at the beginning of condition 3 be read in their ordinary meaning, they cannot be applied to a partial non-delivery any more than to a total non-delivery, for the claim made in that case is in respect of the part of the goods not delivered, and as they were never delivered there is no point at which the three days begin to run. It is possible to read those words as meaning that the claim is to be made within three days after the delivery of the goods together with which those not delivered ought to have been delivered, but I think that is a non-natural sense of the words, as no claim is made in respect of those which are delivered, but only in respect of the undelivered part. If non-delivery, whether total or partial, be excluded from the word "loss" in condition 3, and non-delivery in the latter part of the condition be read as meaning non-delivery whether total or partial, then the whole of the condition can be read in

the ordinary sense of the words, and this, in my opinion, is in favour of the construction which I put upon the word "non-delivery." It is difficult in this view to give much meaning to the word "loss," but this does not seem to me to outweigh the other considerations.

Therefore, though the question is by no means free from difficulty, I think that the construction put upon this note by the Divisional Court was correct.

It was contended before us that this question did not arise because each of the carcases was a package, and, therefore, there were so many packages not delivered, but I do not think we can entertain that contention because there was no finding of fact that the carcases were each of them properly addressed, and, though it may have been suggested, I doubt if that contention was before the county court judge in such a form that it can now be taken.

On the other points in the case I do not think it necessary to say more than that I agree with the decision of the Divisional Court upon them.

I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Billing & Co. for Fairfax Spofforth, Bristol.*

Solicitor for defendants: *L. B. Page.*

W. F. B.

1914
Oct. 28.

WAKEFIELD *v.* DUCKWORTH & CO.

Principal and Agent—Solicitor—Personal Liability—Order for Photographs for Defence of Client—Knowledge of Photographer that Solicitor is acting for Client.

A member of a firm of solicitors ordered certain photographs from the plaintiff, a photographer, for the purposes of litigation in which the solicitors were acting for a client. The plaintiff, who knew that the solicitors were so acting and that the photographs were required for the purposes of the litigation, debited the solicitors with the price of the photographs in his books. In an action brought by the plaintiff to recover the price of the photographs from the solicitors:—

Held, that the solicitors were not liable inasmuch as they were prima facie agents acting on behalf of a principal and the transaction was not a cash transaction in the sense that the solicitors had no authority to pledge the credit of the client, nor had any custom been proved that a solicitor who makes a contract of this nature is personally liable.

Appeal by the plaintiff Wakefield from a judgment of the judge of the Brentford County Court.

The plaintiff, a photographer, brought the action in the county court against the defendants, a firm of solicitors, to recover 5*l.* 17*s.*, the price of photographs taken by him on the instructions of a member of the defendants' firm in connection with a charge of manslaughter in which the defendants were acting for the accused person. The defendants had declined to pay for the photographs upon the ground that they were not personally liable for the price. It was proved that Mr. Duckworth, the member of the defendants' firm who ordered the photographs, called at the plaintiff's studio and ordered them. The plaintiff knew that the defendants were solicitors and that the photographs were wanted for the purposes of the trial of their client. It was also proved that in ordering the photographs the solicitor said, "Make the charges as low as you can, for the fellow is only a poor chap." The plaintiff had debited the defendants in his books with the price of the photographs.

At the conclusion of the plaintiff's case the county court judge held that the defendants were only acting as agents for their client and were not responsible for the cost of the photographs, and gave judgment for the defendants.

The plaintiff appealed.

W. H. Moresby, for the plaintiff. In conducting litigation a solicitor must be taken to be acting as agent for his client unless he does something to make himself personally liable. If he rightly takes credit he is presumed to be pledging the credit of his client. But if the solicitor takes credit in a transaction like the present one, which is a cash transaction, he makes himself personally liable. It was clearly a cash transaction. The solicitor went to the photographer and ordered the photographs. In *Lee* v. *Everest* (1), where the solicitor had engaged the services of a professional witness, the solicitor was held not to be personally liable for the charges and expenses of the witness because professional witnesses look to the client and not to the solicitor for their remuneration. In *Robins* v. *Bridge* (2) Lord Abinger C.B. said: "The attorney is known merely as the agent, the attorney of the principal, and is directed by the principal himself. The agent, acting for and on the part of the principal, does not bind himself, unless he offers to do so by express words; he does not make himself liable for anything, unless it is for those charges which he is himself bound to pay, and for which he makes a charge. If therefore he employs a stationer to do anything for which he makes a charge, he is liable, as he is for the fees of the officers of the Court, for these are ready-money transactions, for which the person engaged in the business of the Court is liable; for it cannot be presumed that the client would authorize him to pledge his credit where no credit is given." Photographs are not usually necessary in litigations, and *In re Blyth and Fanshaw* (3) shows that if the solicitor incurs unusual expense he also incurs personal responsibility. There was no evidence in the present case that the solicitor entered into the contract on behalf of his client. [*Cocks* v. *Bruce* (4) and *Hartop* v. *Juckes* (5) were also referred to.]

H. J. Wallington, for the defendants, was not called upon.

LORD COLERIDGE J. I am of opinion that the decision of the county court judge was right. The plaintiff is a photographer,

(1) (1857) 26 L. J. (Ex.) 334.
(2) (1837) 7 L. J. (Ex.) 49; 3 M. & W. 114.
(3) (1882) 10 Q. B. D. 207.
(4) (1904) 21 Times L. R.62.
(5) (1814) 2 M. & S. 438.

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Lord Coleridge J.

and a member of the defendants' firm went to him and asked him to supply some photographs for the purposes of a trial in which the defendants were acting on behalf of a client. There is no question that the plaintiff knew that the defendants were solicitors acting on behalf of a client, and that being so, apart from any other considerations, they were agents acting on behalf of a principal. Prima facie in such a contract the plaintiff would have to have recourse to the principal and not the agent. It is said, however, that in the present case the mere fact that the solicitors by their partner gave the order made them personally responsible. That is not so.

There are certain exceptional cases in which, although one party to a contract knows that the other is a solicitor acting for a client, yet the solicitor is personally responsible, for instance, in cash transactions, where it is to be assumed that the solicitor has no authority to pledge the credit of his client. The present transaction was not a cash transaction in that sense, although no doubt an action would lie for the price of the photographs as soon as they were delivered. The bill was an ordinary one for photographs sent in by the plaintiff to the partner who ordered them. Another case in which the solicitor might be personally responsible is where a custom can be proved that he should be so. It is for the judge to say in any particular case whether such a custom has been proved, and if it were proved it would override the ordinary incidents of law so far as that case is concerned. In the present case no such custom has been proved. The photographer knew that he was dealing with the solicitor as an agent, and the mere fact that he chose to debit the solicitor in his books does not throw upon him any liability to pay. The decision of the county court judge was right and the appeal must be dismissed.

SHEARMAN J. I am of the same opinion.

Appeal dismissed.

Solicitor for plaintiff: *W. Firth.*

Solicitors for defendants: *H. C. Duckworth & Co.*

J. E. A.

[IN THE COURT OF APPEAL.]

C. A.
1914
Jan. 26.

RICHARDS *v.* MORRIS.

Employer and Workman—Compensation—"Out of" the Employment—Island —Boat provided by Employer—Term of Contract of Service—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

A workman was employed on an island at yearly wages and board and lodging, and it was part of his contract of service that he should be allowed at reasonable times to cross to the mainland to visit his wife, and be taken across in his employer's boat for that purpose. He met with an accident whilst in the boat on his way home, from the effects of which he died:—

Held, that the accident arose "out of" as well as "in the course of" the employment, and that his widow was entitled to compensation under the Workmen's Compensation Act, 1906.

Appeal from an award of the judge of the Haverfordwest County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

This was an application by the widow of a deceased workman who was employed as a farm labourer on the island of Ramsay, and had been thus employed since the year 1911. The island was separated from the mainland of Pembrokeshire by a channel of the sea about a mile wide. The man was married in August, 1912, and his employer advanced money to help him to marry. He was employed on the island at yearly wages and board and lodging, and from time to time came to his home on the mainland to see his wife. It was in his employer's boat that he was taken backwards and forwards, and there were no other means of transit.

The Court held that it must be assumed that it was an implied term of his contract of service that at all reasonable times he should be allowed to leave the island and go home. On the occasion in question he had not been home for some time, and wanted to go on the Saturday, but his employer would not take him because the weather was too bad. The employer's boat was the only one on the island, and on Sunday the weather moderated and the deceased was taken across in her by his employer. The boat was taken out simply for the purpose of taking him across. After crossing the channel, but before

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actually reaching the mainland, he tried to get ashore out of the boat, but slipped and injured himself internally against the gunwale of the boat. He scrambled back into the boat, and on arriving at the proper landing place he landed and started to walk home, but fell down, was taken home in a cart, and died soon afterwards of the injuries he had received in the boat.

His widow applied for an arbitration, and the learned judge found that the deceased was injured in getting out of the boat and the injury resulted in his death; that he left the island by leave of his employer; that there was no other way of getting to the mainland except the employer's boat; and that the deceased was going to the mainland solely for his own purposes. Accordingly his Honour held that the accident did not arise out of and in the course of the employment.

The applicant appealed.

Hugo Young, K.C., and *Howell Owen*, for the appellant. It was a term of his contract of service that the deceased should use his employer's boat in this way, therefore the injury arose out of the employment: *Kitchenham* v. *Owners of S.S. Johannesburg* (1); *Moore* v. *Manchester Liners* (2); *Fletcher* v. *Owners of Ship Duchess* (3); *Webber* v. *Wansborough Paper Co.* (4); *Cook* v. *S.S. Montreal* (5); *Edwards* v. *Wingham Agricultural Implement Co.* (6); *Mole* v. *Wadsworth.* (7)

Rayner Goddard, for the employer. The deceased was going home for his own purposes, not on his employer's business; therefore the accident did not arise out of the employment. The fact that there were no other means of access than the employer's boat makes no difference. There was no evidence of any contract to ferry the deceased across; and his work was ended before he entered the boat. There is a distinction between an island and a ship, but if they are to be treated in the same way it is admitted that this case is covered by *Webber* v. *Wansborough Paper Co.* (8)

No reply was called for.

(1) [1911] A. C. 417.
(2) [1910] A. C. 498.
(3) [1911] A. C. 671.
(4) [1913] 3 K. B. 615, 620.
(5) (1913) 6 B. W. C. C. 220.
(6) [1913] 3 K. B. 596.
(7) (1913) W. C. & Ins. Rep. 160.
(8) [1913] 3 K. B. 615.

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SIR SAMUEL EVANS, PRESIDENT. This is an appeal from the decision of the judge of the Haverfordwest County Court, and the question is whether the accident which caused the death of the applicant's husband arose "out of and in the course of" his employment. The county court judge found these facts [his Lordship read them] and held that the accident did not arise out of and in the course of the deceased man's employment. There have been a very large number of cases in which this question has been discussed, namely, as to the point at which a person who has been injured whilst away from his actual place of work leaves his employment. The line is a very fine one, and the learned judge has here found that the deceased at the time he met with the accident was not engaged in his employment and that the accident did not arise "out of and in the course of" his employment. The question we have to decide is whether, on the admitted facts, the county court judge's decision is right. The facts are peculiar. [His Lordship stated them substantially as set out above.]

In these circumstances I am of opinion that it was part of the contract between the deceased and his employer that reasonable facilities should be given to him to go ashore to visit his wife, and the only means of doing so were by his employer's boat, and in crossing the sound and before he got out of the boat the accident happened. In these circumstances I think the case falls on the other side of the line and the decision ought to be the other way. The appeal must be allowed, and the applicant is entitled to recover compensation at the amount which has been agreed. An award must be made accordingly with costs here and below.

COZENS-HARDY M.R. and EVE J. agreed.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co., for W. Evans, Fishguard; Peacock & Goddard, for Eaton, Evans & Williams, Haverfordwest.*

H. C. R.

1914
Nov. 13.

THE KING *v.* THE REGISTRAR OF THE THETFORD COUNTY COURT.

Employer and Workman—Compensation—Agreement for Redemption of Weekly Payment by Lump Sum—Obligation of Registrar to register where the Money has been paid—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. II.* (9.), (10.).

Where the amount of compensation payable to an injured workman under the Workmen's Compensation Act, 1906, has been ascertained by agreement the obligation of the registrar of the county court, under Sched. II. (9.) of that Act, to register a memorandum of such agreement is not affected by the fact that the agreement has already been executed by the money being paid.

Rule for a mandamus to the registrar of the Thetford County Court to register an agreement under the Workmen's Compensation Act, 1906.

In July, 1910, one John Stinton, a workman in the employment of the Brandon Gas Company, was injured by an accident arising out of and in the course of his employment, and he was thereby permanently and totally incapacitated for work. He took proceedings in the Thetford County Court against the company under the Workmen's Compensation Act, 1906, and was awarded compensation at the rate of 19*s.* per week, which was the maximum to which he was entitled, and the same was duly paid to him up to March, 1914. In that month an agreement was entered into in writing between Stinton and the company that the company should redeem the said weekly payment by a lump sum of 474*l.*, which was the maximum sum to which he was entitled in respect of such redemption. The agreement contained an acknowledgment by Stinton of the receipt of the 474*l.* which was duly paid to him. After the money had been so paid the company sent the agreement to the registrar of the county court to be registered. By Sched. II. (9.) of the Workmen's Compensation Act, 1906, "Where the amount of compensation under this Act has been ascertained . . . . by agreement, a memorandum thereof shall be sent . . . . by any party interested to the registrar of the county court, who shall . . . . , on being satisfied as to its genuineness, record such memorandum in a special

register . . . . and thereupon the memorandum shall for all purposes be enforceable as a county court judgment."

(10.) "An agreement as to the redemption of a weekly payment by a lump sum, if not registered in accordance with this Act, shall not, nor shall the payment of the sum payable under the agreement, exempt the person by whom the weekly payment is payable from liability to continue to make that weekly payment . . . . unless . . . . he proves that the failure to register was not due to any neglect or default on his part."

The registrar refused to record the memorandum and referred the matter to the judge of the county court, who held that Sched. II. (9.) only applied to a memorandum of an agreement which was capable of being enforced as a county court judgment; that, the money having been paid, the agreement in question was no longer so enforceable; and that the registrar was under no obligation to register it. He accordingly upheld the refusal of the registrar. The company obtained a rule calling on the registrar to show cause why he should not register it.

H. D. Samuels (*G. A. Branson* with him) showed cause. The registrar was right in refusing to register, for the agreement was not a "genuine" one within the meaning of the Act. It has been held by the Court of Appeal in *Popple* v. *Frodingham Iron and Steel Co.* (1) that an agreement is not "genuine" if it is no longer enforceable by reason of its being spent and not being an existing agreement. There an agreement was entered into between the employer and the injured workman for the payment of weekly compensation so long as total incapacity for work should continue. After the total incapacity had ceased the employer applied to have the agreement registered. The Court refused to order its registration. Cozens-Hardy M.R. said that "paragraph 9 applies only to compensation payable and does not extend to compensation which, as a matter of history, was payable at some past date. For example, an agreement for a weekly payment expressed to be payable only up to December 31 could not be recorded in January, if all payments up to December 31 had been duly made." He suggested that "the word

(1) [1912] 2 K. B. 141.

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'genuine' in itself implies not merely an agreement which in truth was made, but also that the agreement so made is one capable of being enforced as a county court judgment." Buckley L.J. said that an agreement to be registrable "must be a subsisting agreement under which either arrears or future payments are or may become due." In the present case, as the agreed sum had at the date of the application for registration been already paid, there was nothing left to enforce.

Hollis Walker, K.C., and *Ellis Hill*, in support of the rule. The county court judge had not his attention directed to paragraph 10 of the schedule. Having regard to the provisions of that paragraph the employer who has paid an agreed sum to the workman has no means of protecting himself from being called upon to pay over again except by getting the agreement registered or by proving that the failure to register was not due to any neglect or default on his part. That provision would seem to imply that the fact of his having paid the money does not disentitle him to have the agreement registered.

Samuels in reply.

DARLING J. I think that if the registrar in this case were upheld in the view that he has taken a grave injustice would be done to these employers who have paid the workman the maximum amount of compensation for his injury and have got a receipt for it. They would be deprived of the means of enforcing against the workman as a county court judgment the agreement which has been come to. The contention of the registrar assumes that the words "enforceable as a county court judgment" mean enforceable by the plaintiff. I think they mean that it shall be enforceable by either party, by the employer as well as the workman. If the agreement is registered it becomes enforceable in the employer's favour by way of estoppel. I think paragraph 10 shows that if it is not absolutely necessary for the protection of the employer that the agreement should be registered it is very desirable in his interest that it should be so, for where he has applied for registration and been refused he ought not to be afterwards called upon to prove that the failure to register was not due to his default.

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LAWRENCE J. I am of the same opinion.

SANKEY J. I agree. I think that *Popple* v. *Frodingham Iron and Steel Co.* (1) has no bearing on this case. Moreover in that case the attention of the Court was not called to paragraph 10.

Rule absolute.

Solicitors for the Brandon Gas Company: *Watson, Sons & Room.*

Solicitor for the registrar: *Solicitor to the Treasury.*

J. F. C.

W. L. INGLE, LIMITED *v.* MANNHEIM INSURANCE COMPANY.

1914
Oct. 19, 29.

[1914 W. 2263.]

War—Alien Enemy—Foreign Insurance Company—Branch Office in England—Policy of Marine Insurance—Loss—Right of Action not suspended—Trading with the Enemy—Proclamations.

By clause 5 of the Trading with the Enemy Proclamation of October 8, 1914, where an enemy has a branch locally situated in British territory which carries on the business of insurance, transactions with such branch in respect of the business of insurance shall be considered as transactions with an enemy.

An insurance company registered under the law of Germany and having its head office in that country had a branch office in London where insurance business was transacted on its behalf by the company's underwriters and agents. A policy of marine insurance was effected by the plaintiffs in July, 1914, with the company through its branch office. A loss under the policy occurred after the outbreak of war but before the coming into force of the Trading with the Enemy Proclamation of October 8, 1914. In an action to recover the loss:—

Held, first, that, apart from the Proclamation of October 8, 1914, the rules applicable to trading with alien enemies did not apply to business transacted with the branch office; and, secondly, that, assuming that the Proclamation had a retrospective effect, a claim to recover a loss under a policy was not a "transaction" within clause 5 of the Proclamation; and that the action could, therefore, be maintained.

SUMMONS to transfer an action to the commercial list, adjourned into Court.

The action was brought to recover a loss under a policy of

(1) [1912] 2 K. B 141.

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W. L. INGLE, LIMITED v. MANNHEIM INSURANCE COMPANY.

marine insurance issued by the defendant company to the plaintiffs on July 31, 1914.

The defendant company was incorporated in the Grand Duchy of Baden, where it had its head office. It had a branch office in London where it carried on the business of insurance through its underwriters and agents, who accepted and settled risks and issued policies for the company. The company had complied with the provisions of s. 274 of the Companies (Consolidation) Act, 1908, relating to companies established outside the United Kingdom which have a place of business within the United Kingdom.

The policy sued upon had been effected through the company's office in London. It contained a clause giving jurisdiction to the English Courts as fully as if the company were incorporated in England and authorizing the service of process upon its agents in this country.

The loss in respect of which the action was brought occurred at the end of August or the beginning of September, 1914, and the plaintiffs' alleged right to sue accrued to them and was complete before the Trading with the Enemy Proclamation of October 8, 1914.

Clause 6 of the Trading with the Enemy Proclamation, No. 2, of September 9, 1914, is as follows: "Provided always that where an enemy has a branch locally situated in British, allied, or neutral territory, not being neutral territory in Europe, transactions by or with such branch shall not be treated as transactions by or with an enemy."

By clause 5 of the Proclamation of October 8, 1914, it is provided that: "Notwithstanding anything contained in paragraph 6 of the Trading with the Enemy Proclamation, No. 2, where an enemy has a branch locally situated in British, allied, or neutral territory, which carries on the business of insurance or re-insurance of whatever nature, transactions by or with such branch in respect of the business of insurance or re-insurance shall be considered as transactions by or with an enemy."

The defendants opposed the application to transfer on the ground that the obligation to pay the losses was suspended because of the war.

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R. A. Wright, for the plaintiffs. There is no ground for staying this action. The defendant company is not an alien enemy as regards transactions effected through its branch office in this country. In *Janson* v. *Driefontein Consolidated Mines* (1) Lord Lindley said: "The subject of a State at war with this country, but who is carrying on business here or in a foreign neutral country, is not treated as an alien enemy; the validity of his contracts does not depend on his nationality, nor even on what is his real domicil, but on the place or places in which he carries on his business or businesses." This position is expressly adopted with regard to a branch in this country of the business of an enemy by clause 6 of the Proclamation of September 9, 1914. The Proclamation of October 8 is not retrospective and does not affect a cause of action which has accrued before the date of that Proclamation. [He referred to Hall's International Law, 6th ed. p. 388, and *Princess of Thurn and Taxis* v. *Moffitt*. (2)]

T. Mathew, for the defendant company. The effect of the Trading with the Enemy Proclamations is that the performance of the contract contained in the policy sued upon is suspended. The defendant company is undoubtedly an alien enemy. Under clause 6 of the Proclamation of September 9 transactions with the branch office in this country were permitted, but that clause has been rescinded, and now under the Proclamation of October 8 a transaction with the branch, in respect of insurance business, is to be considered as a transaction with an enemy. The effect of that is that the plaintiffs were not entitled to call upon the defendant company to pay the loss under this policy. A contract cannot be carried out if it involves intercourse with the enemy, and payment of the loss would undoubtedly do so. This action ought therefore to be stayed.

Cur. adv. vult.

1914. Oct. 29. BAILHACHE J. read the following judgment:— This application is in form a summons to transfer an action on a policy of marine insurance to the Commercial Court, but as the defendants are a German company whose head office is in Germany, difficult and unaccustomed points arise as to whether, in view of

(1) [1902] A. C. 484, at pp. 505, 506. (2) [1915] 1 Ch. 58.

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the war, such an order ought to be made. It is opposed by the defendants. The facts which it is necessary to mention are as follows. The policy was issued on July 31, 1914, by a German company having its head office in Germany. The loss occurred at the end of August or beginning of September and the plaintiffs' alleged right to sue accrued to them and was complete before the Proclamation of October 8, to which I shall have to refer. The defendants carry on business in this country through their underwriters and agents here, appointed by them for the purpose. These underwriters accept and settle risks and issue policies for the defendants, and this policy was effected through such underwriters. The defendants have complied with the provisions of s. 274 of the Companies (Consolidation) Act, 1908, relating to companies established outside the United Kingdom which establish a place of business within the United Kingdom. The policy sued upon contains a clause giving jurisdiction to the English Courts as fully as if the company were incorporated in England and authorizing the service of process upon its agents here. The application to transfer is one which in ordinary circumstances would be made as a matter of course, and an order would be made without objection but for the war.

The defendants now object upon the ground that in consequence of the war the obligation to pay the losses and the rights of suit in respect of such obligation are suspended, and that an order to transfer is therefore futile and ought not to be made.

I have already held in a case against the same defendants that an action in which the pleadings were closed before the war is not automatically suspended by the outbreak of war. In that case I was told by the defendants, and it was not disputed, that the defendants acquired the status of alien enemies on the commencement of the war. In this case that proposition is challenged and is the first point with which I have to deal. Upon the facts stated by me I think that, apart from the effect of the Proclamation of October 8 with which I shall have presently to deal, the defendants were not in the position of alien enemies. In the case of individuals and at common law the question whether a man is to be treated as an alien enemy for the purpose of his contracts, rights of suit, and the like, does not depend upon his

nationality or even upon his true domicil, but upon whether he carries on business in this country or not. If he does it is not illegal even during war to have business dealings with him in this country in respect of the business which he carries on here. He is not in respect of that business divided by the war line, but has what is sometimes called a commercial domicil here. The same thing is true of companies whose head office is in Germany but which have a branch office here in respect of business transactions with such branch office.

The matter is discussed by Lord Lindley in *Janson* v. *Driefontein Consolidated Mines* (1) and in the cases cited by him. In my judgment the defendant company did, upon the facts stated, so far carry on business through their underwriters here as to prevent the rules applicable to alien enemies from applying to business transacted with those underwriters, as this business in fact was.

Turning now to the Proclamations affecting the question, this position seems to be recognized by the Executive Government in the Proclamation of September 9 last, clause 6 of which reads: "Provided always that where an enemy has a branch locally situated in British, allied, or neutral territory, not being neutral territory in Europe, transactions by or with such branch shall not be transactions by or with an enemy." If this were the present position, it would, I think, be reasonably clear that the plaintiffs' right to sue is unaffected by the war, and that no question of alien enemy arises. The defendants' status has, however, undoubtedly been altered by the Proclamation of October 8, clause 5 of which reads: "Notwithstanding anything contained in paragraph 6 of the Trading with the Enemy Proclamation, No. 2," (that of September 9) "where an enemy has a branch locally situated in British, allied, or neutral territory, which carries on the business of insurance or re-insurance of whatever nature, transactions by or with such branch in respect of the business of insurance or re-insurance shall be considered as transactions by or with an enemy." The defendants are therefore since that date in the same position as alien enemies in respect of their business transacted here, but I agree with the plaintiffs that that Proclamation is not retrospective. Even if

(1) [1902] A. C. at pp. 505, 506.

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this Proclamation is to be treated as affecting the position, I am not prepared to hold that payment of a loss by a German insurance company, or an action against such insurance company to recover a loss, is a "transaction" within the meaning of the Proclamation. So to hold would be to deprive a British subject of the right to receive money from, or to sue, an alien enemy, which, in my opinion, he at law has, at any rate when the right to be paid or to sue has accrued before the defendant has acquired the status of an alien enemy; and I should require to find clear words in a Proclamation to induce me to decide that the Executive Government has given the alien enemy relief to which he is not otherwise entitled. Paragraph 7 of the Proclamation of September 9, which has not been repealed, seems to me in accordance with this view. It runs thus: "Nothing in this Proclamation shall be deemed to prohibit payments by or on account of enemies to persons resident, carrying on business, or being in Our Dominions, if such payments arise out of transactions entered into before the outbreak of war or otherwise permitted." This clause is I think conclusive that the right to receive payment from an alien enemy is intended to be left as it stands at common law. It is not perhaps immaterial to observe that the word "transactions" is used in this clause as in clause 5 of the Proclamation of October 8. In this clause the word clearly refers to the business dealings in respect of which the right to payment arises and does not include, but is used in contradistinction to, the payments themselves. I see no reason to suppose that the same word has not the same meaning in both Proclamations.

I ought perhaps to refer to the fact that the Proclamation of October 8 repeals clause 6 of the September 9 Proclamation dealing with insurance, but it does not in my opinion affect the point now under discussion and I merely mention it to show that I have not overlooked it.

Upon the whole I have come to the conclusion that the order to transfer ought to be made, and I make it accordingly.

Solicitors for plaintiffs: *Parker, Garrett & Co.*

Solicitors for defendant company: *Waltons & Co.*

F. O. R.

In re An Arbitration between THE OLYMPIA OIL AND CAKE COMPANY, LIMITED and THE PRODUCE BROKERS COMPANY, LIMITED.

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May 11, 12, 19.

Sale of Goods—Performance—Resale—Appropriation of Cargo to Contract—Cargo lost to the Knowledge of Sellers at Time of Tender of Appropriation—Whether Tender valid.

In May, 1912, the P. company sold to the O. company 6000 tons of Soya beans to be shipped from an Oriental port during December, 1912, and/or January, 1913, by steamer to Hull. Clause 3 of the contract provided that "particulars of shipment . . . . to be declared by original sellers not later than forty days from the date of last bill of lading . . . . In case of resales, copy of original appropriation shall be accepted by buyers and passed on without delay . . . ." Clause 10 provided that "this contract is to be void as regards any portion shipped that may not arrive by the ship or ships declared against this contract . . . ." In September, 1912, the P. company purchased from the E. A. company under a similar contract 6000 tons of Soya beans for shipment in December, 1912, and/or January, 1913. On February 4, 1913, the P. company received a declaration and appropriation of a cargo of Soya beans for the *Canterbury*, which was stated to have sailed from Vladivostok on January 31, and on the same date (February 4) the P. company declared and appropriated this shipment to their contract with the O. company. On February 4 the *Canterbury* was wrecked and her cargo was totally lost, the loss being known in London about 3 P.M. on that day. The fact of the loss of the ship and cargo was not known to the E. A. company at the time of their tender to the P. company, but the P. company were aware of it at the time of making their tender to the O. company. The O. company refused to accept the tender :—

Held, that the O. company were not bound to accept the tender as the ship and cargo were to the knowledge of the P. company lost at the time they purported to make the tender; and that clause 10 did not come into operation in a case where there had been no valid declaration and appropriation as between the P. company and the O. company.

Special Case stated for the opinion of the Court at the request of the Olympia Oil and Cake Company, Limited, by the committee of appeal of the Incorporated Oil Seed Association.

1. The Olympia Oil and Cake Company, Limited (hereinafter called the buyers), appealed from the award of the umpire acting in an arbitration between them and the Produce Brokers Company, Limited (hereinafter called the sellers).

2. On May 30, 1912, the sellers agreed to sell and the buyers agreed to buy 6000 (10 per cent. more or less) tons of 2240 lb.

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each Harbin and/or Dalny Soya beans to be shipped from an Oriental port or ports during December, 1912, and/or January, 1913, by steamer direct or indirect via Suez Canal or Cape to Hull, at 7*l.* 18*s.* 9*d.* per ton. The contract provided: "If shipped as a cargo, buyers to have the option of charterparty."

3. Clause 3 of the contract provided that "particulars of shipment with date of bill or bills of lading, approximate weight, marks (if any) and numbers of bags to be declared by original sellers not later than forty days from the date of last bill of lading. . . . . In case of resales, copy of original appropriation shall be accepted by buyers and passed on without delay. . . . ."

4. Clause 10 provided: "This contract is to be void as regards any portion shipped that may not arrive by the ship or ships declared against this contract, and also if shipment or delivery be prevented by embargo, hostilities, prohibition of export, or blockade."

5. The form of contract used was the printed form of contract issued by the Incorporated Oil Seed Association for sales of cargoes of Manchurian Soya beans, with slight variations adopted by the parties.

6. By a contract dated September 9, 1912, the sellers purchased from the East Asiatic Company (the shippers of the cargo), under a contract similar to the above-mentioned contract, an identical quantity of 6000 tons (10 per cent. more or less) Harbin and/or Dalny Soya beans for shipment in December, 1912, and/or January, 1913.

7. By letter dated January 24, 1913, the sellers informed the buyers that they had not yet received a tender, but believed that the same would be in the *Canterbury*. On January 29 the sellers agreed to purchase from the buyers 6000 tons Harbin and/or Dalny Soya beans, December/January, to Hull, and stated in their letter of this date confirming the purchase, "We shall put this against our sale to you of May 30, 1912."

8. On February 4, 1913, the sellers received a declaration and appropriation of 6400/6600 tons per the *Canterbury*, stated to have sailed from Vladivostok on January 31. On February 4 the sellers declared and appropriated this shipment to their contract with the buyers and claimed that the buyers should

re-tender the same in fulfilment of the contract of January 29, 1913.

9. The *Canterbury* sailed from Vladivostok on February 3, and shortly after sailing struck submerged rocks fifteen miles from Karatsu. She was towed off on February 4, but foundered immediately afterwards. The loss was known in London about 3 P.M. on February 4. It was not known to the East Asiatic Company at the time of their tender, but the sellers were aware of it at the time of making their tender.

10. The buyers contending that they were not bound to accept the tender per the *Canterbury*, the dispute was referred to arbitration in pursuance of the rules indorsed on the contract. The umpire by his award dated May 9, 1913, awarded "that the appropriation per the *Canterbury* is a good appropriation in the terms of the contract, and must be accepted by the buyers."

11. The buyers appealed from that award to the committee of appeal and contended:—

(1.) That the *Canterbury* having sunk or been lost with her cargo before the tender by the sellers, the tender was bad.

(2.) Alternatively, that the tender was bad because the sellers knew of the sinking or loss of the *Canterbury* and/or her cargo before they made the tender.

(3.) That there was not a resale within the meaning of clause 3 of the contract, the sale to the buyers having taken place before the sellers purchased the beans under the contract of September 9, 1912, and that the buyers were not bound to accept the tender as an appropriation passed on by their sellers on a resale.

(4.) That the provisions of clause 3 as to resales could not in this case apply, the *Canterbury* and her cargo being at the bottom of the sea when the sellers made or purported to make the appropriation.

12. The buyers desired to offer evidence relating to other contracts under which the sellers were alleged to have made tenders or appropriations of the cargo or portions of it to other buyers before or at the same time as they made the tender to the buyers, but the committee did not deem this evidence relevant to the matters in question upon this appeal.

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13. The sellers contended :—

(1.) That under clause 3 of the contract the buyers, as "buyers" from the sellers under a resale, were bound to accept as a valid declaration the copy of the original appropriation received by the sellers and handed on by them to the buyers.

(2.) Alternatively, that by clause 3 the sellers having passed on without delay to the buyers the copy of the original appropriation received and accepted by them as "buyers" were entitled to call on the buyers to accept such copy as a valid declaration.

(3.) That by reason of the loss of the *Canterbury* with all her cargo the contract became void pursuant to clause 10 of the contract.

The questions of law for the opinion of the Court were :—

(1.) Whether, having regard to the terms of the contract of May 30, 1912, a tender or appropriation under clause 3 could validly be made if at the material time, and whether to the knowledge of the sellers or not, the vessel and her cargo had already become a total loss.

(2.) Whether there was any difference "in case of resales," and, if so, whether the sentence in clause 3, "In case of resales, copy of original appropriation shall be accepted by buyers and passed on without delay," applied to the facts of this case.

(3.) Whether under the circumstances above detailed the provisions of clause 10 of the contract applied so as to render the contract void as regards the beans shipped by the *Canterbury* which had not arrived by that vessel.

(4.) (*a*) Whether the committee of appeal were right in rejecting the evidence tendered by the buyers; (*b*) whether, if the Court should be of opinion that such evidence was relevant and ought to have been received, the tender of the sellers was bad if the committee of appeal should find that the sellers tendered or appropriated the cargo or portions of it to other buyers or under other contracts of sale before or at the same time as they made the tender of the whole cargo to the buyers or after they made the tender to the buyers.

(5.) Whether the sellers were relieved from every obligation to the buyers under the contract by tendering the cargo shipped per steamship *Canterbury*.

Leslie Scott, K.C., and *C. Robertson Dunlop*, for the buyers (appellants).

Leck, K.C., and *F. D. MacKinnon*, for the sellers (respondents).

Cur. adv. vult.

May 19. AVORY J. read his judgment, which, after stating the facts, continued: Under these circumstances, the substantial question submitted to the Court is whether the tender or appropriation, made by the respondents at a time when the vessel and her cargo had become a total loss, was a valid appropriation in fulfilment of their contract with the appellants.

It was contended on behalf of the respondents that, having passed on without delay to the appellants the copy of the original appropriation received and accepted by them from the original sellers, the East Asiatic Company, the appellants were bound, under clause 3 of the contract, to accept the same as a valid appropriation; and, in the alternative, that by reason of the loss of the ship and her cargo, the contract was void pursuant to clause 10 of the contract, which, they said, ought to be construed as a contract for the sale of goods "to arrive" in Hull, the property in which would not pass except upon arrival, or as what is called a c.i.f. contract.

In my opinion, clauses 3 and 10 of this contract both contemplate a declaration and appropriation of a ship and goods then in existence by the seller to the buyer under the particular contract which is in question; that a valid appropriation cannot be made under this contract of goods which for the purpose of the contract are at the time no longer in existence, even though there may have been a prior valid appropriation of the same goods by the original seller; and that clause 10 does not come into operation in a case where there has been no valid declaration and appropriation as between the seller and the buyer under the particular contract in question.

For these reasons, I think questions 1, 2, 3, and 5, submitted to the Court in the special case, should be answered in the negative; and that the fourth question does not arise. If it did, I think the tender would be bad, if the sellers had tendered the

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same goods to other buyers under other contracts before or at the same time as the tender in question, provided such other tender were accepted by such other buyers. For these reasons the answers which I have indicated will be the answers sent back to the committee of appeal.

ROWLATT J. read the following judgment:—The contract between the parties to this arbitration was for the sale of 6000 tons of Harbin and/or Dalny Soya beans, to be shipped from an Oriental port during December, 1912, and/or January, 1913. The form was a printed form of contract for the sale of a cargo, though it was altered by the addition of the words "or parcels sellers' option." It was also provided that, if shipped as a cargo, the buyers were to have the option of charterparty. In the events that happened, the sellers did offer a cargo in fulfilment of the contract; and it is as a cargo contract that it has to be interpreted.

It is plain that under a contract such as this a seller may either tender a cargo which he has shipped himself, or which he has acquired from another after shipment. In either case it is necessary, in order to fulfil the contract, that the seller should at some time declare the ship whose cargo is to be received by the buyer. Clause 3 of the contract, noted in the margin "Declaration of shipment," does not, in my view, create the duty of declaring. It assumes its existence and provides for the time, and to some extent the manner, of its performance. The clause says that a tender by an original seller (which here means an original tenderer, that is, one who is himself the shipper) must be not later than forty days from the date of last bill of lading. In case of resales (which here means a re-tender, that is, by one who is not the original shipper) copy of original appropriation shall be accepted. The meaning of that is that a tender by a seller who has not himself shipped may be made by handing on a copy only of the original appropriation. This clause cannot, in my judgment, mean that anything purporting to be an original appropriation shall be accepted. It only means that an appropriation, valid in itself, may be made by handing on merely a copy of the original appropriation. The clause further provides that it shall be passed on without delay. The English is faulty;

but there was no dispute at the Bar that the meaning is that every passing-on of an original appropriation must be without delay. No question arises here as to the lapse of time before passing on an original tender, but it is easy to see that in certain circumstances troublesome questions might arise on that point.

The next clause that requires detailed notice is clause 10. That clause deals with two distinct matters. The latter part deals with cases where shipment is prevented by named causes, and may in other cases raise totally different questions from those with which we are now concerned. The first part assumes shipment and deals with the non-arrival of goods by a ship or ships declared against this contract. The words "against this contract" are to be noted, and it is to be observed that it is the ship that has been the subject of the declaration. I think the meaning is quite clear that where the contract has been fulfilled up to the point of declaring a ship, and the only matters to be carried through are delivery and payment, the contract shall be off and the obligations of delivery and payment mutually cancelled as to any goods that do not arrive.

Now, the real question between the parties is whether that clause applies to absolve the seller who declares a ship known to be lost. It seems to me that the clause only applies where there has been a good declaration of a ship, but afterwards the goods do not in fact arrive. Was there, then, a good declaration? Mr. Leck argued that when goods had once been shipped that created a tenderable cargo which remained in existence for that purpose even after the ship had been lost; and that it could be appropriated with the pre-existing certainty, and with the intention, of making the contract void. Pushed to its logical conclusion this would involve that the person in whose hands the ship was lost could afterwards enter into a contract to sell a cargo, and, if the price fell, buy a cargo afloat, tender it, and pocket the difference; and, if the price rose, tender the lost ship and escape from the speculation without loss. Mr. Leck, however, shrank from this conclusion and suggested that in new contracts the already sunk ship would be impliedly barred. It is hard to see where he gets the justification for this distinction if his main argument is correct, but, however that may be, it is clear that

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this result might follow, namely, that a seller who had sold forward, and the market having risen, might actually give a premium for a lost cargo to tender, and so avoid his contract and escape a greater loss. On this footing, namely, as a specially valuable cargo, the Produce Company actually demanded that the Olympia Company should tender back the cargo to them in order that they might tender it on again and so avoid an ulterior contract. It is impossible, indeed, to foresee when the career of usefulness of this lost cargo in avoiding outstanding contracts would end.

Further, this construction involves what to my mind is the absurdity of supposing that a contract like this, which contemplates the handing on of rights acquired by the seller from a third party, can be fulfilled by handing on a right which has ex hypothesi become void. In the hands of the Produce Brokers Company their contract with the Asiatic Company had become, or was bound to become, void under clause 10. Yet the contention is that they can hand on this avoided contract in fulfilment of their own with the Olympia Company.

I think that the plain object of this contract is to secure the appropriation of a cargo shipped, and at any rate believed to be afloat, and then expected to be duly delivered; and that when a cargo is known to be lost it becomes, for the purpose of any tender, as if it had never been shipped. For these reasons I agree with the answers read out by my brother Avory, though I prefer to limit myself to the case of a ship known to be lost, the case of a ship lost but not known to have been lost not, in my judgment, arising.

SHEARMAN J. I am of the same opinion, and therefore it is only necessary for me to add a word or two to what has already been said. The question for our decision is: What is the true interpretation of the contract of May 30? That is a printed form of contract, and we have here a not unfamiliar problem. Primarily it is a contract between the two parties to it, but, as is well known in the course of the trade, these goods are transferred and retransferred. The written form of contract contains a number of clauses which are intended to apply after

there has been what has been described in the argument as a string of different sellers and different buyers. Here the parties have agreed in their written form of contract a number of terms, which deal with these retransfers and with the string of transactions; but the framer of the contract did not have in his mind the particular event that has occurred, and consequently we have to try to spell a meaning out of it in applying it to that event. It is argued that, as this is a string contract, the moment one gets a cargo which could be tendered, the appropriation must be deemed to be good through all the transfers of people who are on this chain or string. I think that argument rests on an entire fallacy. In those cases, when all the string has been gone through, one can treat it as they do here. They talk about resale, which, to my mind, means a second sale, or a sale in sequence or a string. I think that is the meaning of the word "resale," though different interpretations were put upon it in the argument. But in dealing with that point, one must not forget that one is looking at the entire series of transactions in which the original seller is supposed to sell to somebody else, who passes it on to a third party, and then that third party passes it on to a fourth; that is the way the transaction grows, though they are not in that exact sequence. As often as not, as, indeed, in this case, after the sale has been made the seller buys for the purpose of delivering the same. In my judgment the transaction between two parties in this chain does not come into the line at all until a valid appropriation has been made. When that is borne in mind there is not much difficulty in solving this question. The sellers in this case did not have a cargo to appropriate, and at the time they purported to make their formal appropriation the ship was at the bottom of the sea and the goods were not in a deliverable state. Under those circumstances this was not a good tender, and it follows that questions 1, 2, 3, and 5 must be answered in the negative.

Judgment accordingly.

Solicitors for buyers: *Andrew M. Jackson & Co., Hull.*
Solicitors for sellers: *Waltons & Co.*

J. S. H.

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Nov. 3, 4.

LLOYD *v.* COOTE & BALL.

[1913 L. 811.]

Solicitor and Client—Statute-barred Costs—Acknowledgment of Indebtedness by Client—Absence of Independent Advice—Benefit to Solicitor—Presumption of Undue Influence.

The defendant, a solicitor, acted for the plaintiff, a widow, in the administration of her husband's estate, of which she was the executrix. The husband had for many years had dealings with the defendant and had employed him as solicitor in a number of matters, but the defendant had never delivered any bills of costs to the husband. After his death the defendant delivered to the plaintiff an account of his dealings with her husband showing a balance of 563*l.* due to the defendant from the husband's estate. The account contained a number of items for costs which were statute-barred. The plaintiff, in ignorance of the Statute of Limitations, and without having any independent advice, gave to the defendant at his request acknowledgments in writing of the indebtedness of the estate to the defendant.

In an action by the plaintiff for an account:—

Held, that the defendant by receiving these acknowledgments had obtained a benefit from his client within the meaning of the well-settled rule of equity with regard to a person who is in a fiduciary position, and that the defendant was, therefore, not entitled to rely on the acknowledgments for the purpose of taking the statute-barred items in the account out of the Statute of Limitations.

Huguenin v. *Baseley* (1807) 14 Ves. 273; 1 W. & T. L. C., 8th ed., p. 259, and *Liles* v. *Terry* [1895] 2 Q. B. 679 applied.

An executor's affidavit for probate which includes in the list of the testator's debts a statute-barred debt does not operate as an acknowledgment of the debt so as to take it out of the statute.

In re Beavan [1912] 1 Ch. 196 followed.

Appeal from the judgment of an official referee.

The plaintiff was the widow and executrix of one George Lloyd, who died on May 29, 1912. The defendant, John Robert Ball, was a solicitor carrying on business under the style of H. C. Coote & Ball. He had acted professionally for Lloyd from 1888 down to the date of his death, chiefly in connection with conveyancing matters; he had also made advances to Lloyd from time to time, and in respect of some of the advances certain securities had been deposited by Lloyd with him. No bills of costs had ever been delivered by the defendant to Lloyd, but draft bills of costs

were prepared contemporaneously with the conclusion of each transaction.

After Lloyd's death the defendant acted as solicitor for the plaintiff in obtaining probate of his will and in the administration of his estate. The defendant delivered to the plaintiff an account covering the whole period of his business dealings with the deceased, showing a balance of 563*l.* 16*s.* 1*d.* due from the deceased to the defendant. This account contained a number of items for costs incurred by, and money lent to, the deceased at various dates more than six years before his death.

The defendant continued to act as solicitor for the plaintiff up to February, 1913, when she instructed another solicitor to act for her.

On April 28, 1913, the writ in this action was issued. The plaintiff claimed, as executrix of her husband, an account under Order III., r. 8, of all dealings and transactions by the defendant with Lloyd in respect of the account delivered by the defendant to the plaintiff and payment of any sum of money found due to the plaintiff on taking the account.

The action was transferred to the official referee, and an order was made that the plaintiff should deliver particulars of her objections to the account and the reasons for her objections. For the purpose of this report it is only necessary to refer to one objection, namely, that certain items in the account were statute-barred.

The contentions of the defendant in answer to this objection were, first, that the items were not statute-barred, because the account was, as the defendant alleged, a running account and there had been a payment on account by Lloyd in 1908; and, secondly, that there had been acknowledgments by the plaintiff of the indebtedness of the estate to the defendant, sufficient to take the case out of the Statute of Limitations.

The facts with regard to the acknowledgments made by the plaintiff, which were four in number, were as follows: First, on August 2, 1912, the plaintiff swore an affidavit for the purpose of obtaining probate; attached to the affidavit was a schedule of debts due from the estate, including the sum of 563*l.* 16*s.* 1*d.* shown by the account to be owing to the defendant. Secondly,

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on October 2, 1912, the plaintiff at the defendant's request signed a list of the creditors of her husband's estate and the sums owing to them, which included the defendant's name as a creditor for the above-mentioned sum. Thirdly, the defendant had received on behalf of the plaintiff the proceeds of policies of insurance on her husband's life, and had paid the money into a separate account with his bankers, and on October 11, 1912, he drew a cheque for 200*l.* on this account with, as he alleged, the plaintiff's authority in order to make a payment to himself on account of the debt due to him from Lloyd's estate. On the counterfoil of this cheque the defendant wrote the words "on account of the indebtedness of Mr. Lloyd," and the plaintiff at the request of the defendant signed the counterfoil. Fourthly, on January 7, 1913, at an interview between the plaintiff and the defendant at the latter's office, the defendant told the plaintiff that he was prepared to deduct 150*l.* from the sum due to him, which would reduce the indebtedness of the deceased to the defendant to 213*l.* 16*s.* 1*d.*, and the plaintiff signed a letter at the request of the defendant authorizing him to pay himself this sum out of the moneys of the deceased's estate which he had in hand. When the plaintiff subsequently claimed to reopen the account, the defendant took up the position that the plaintiff was in that case not entitled to claim this abatement of 150*l.*

At the trial it was contended for the plaintiff that the account could not be considered a running account as all the credits had been appropriated to debit items; and that the acknowledgments were not binding on the plaintiff by reason of the fact that the relation of solicitor and client existed between the defendant and the plaintiff, and the plaintiff had no independent advice at the time she made the acknowledgments.

The official referee gave judgment for the defendant for 150*l.*, the balance due after giving credit for the two sums of 200*l.* and 213*l.* 16*s.* 1*d.* paid as above stated.

The plaintiff appealed.

Parfitt, K.C., and *Ricardo*, for the plaintiff. The official referee was wrong in holding that in taking the account the defendant was entitled to credit himself with the statute-barred

items. An executor's affidavit for probate which includes, in the list of the testator's debts, a statute-barred debt of the testator does not operate as an acknowledgment on which the creditor can rely as taking the debt out of the Statute of Limitations: *In re Beavan.* (1)

Further, with regard to all the matters relied on as acknowledgments the case comes within the principle that a solicitor cannot retain a benefit obtained from his client if the client has not in conferring the benefit had the advantage of independent advice: *Huguenin* v. *Baseley.* (2)

[HORRIDGE J. referred to *Liles* v. *Terry.* (3)]

A solicitor who obtains from his client an acknowledgment sufficient to take out of the statute a statute-barred debt is just as much obtaining a benefit within the principle laid down in those authorities as if the client made him a direct gift. It was the duty of the defendant to advise the plaintiff as to what her rights were, or to see that she obtained independent advice: *Willis* v. *Barron* (4); *In re Birt* (5); *Nocton* v. *Lord Ashburton.* (6)

Rawlinson, K.C., and *Moresby*, for the defendant. At the time the acknowledgments were given by the plaintiff the defendant held certain shares which had been deposited with him by the plaintiff's husband as security for the sums owing by him to the defendant. The defendant was entitled to realize his security in order to satisfy the debt although it was statute-barred. The fact that the plaintiff gave the acknowledgments therefore did not confer upon the defendant any benefit. But in any event the principle of *Huguenin* v. *Baseley* (2) and *Liles* v. *Terry* (3) does not assist the plaintiff. All the cases in which that principle has been applied have been cases where a gift has been made by a client to a solicitor or to some one closely related to him. It would be a very wide extension of the principle to permit a client to invoke it so as to avoid payment of a statute-barred debt.

(1) [1912] 1 Ch. 196.
(2) 14 Ves. 273; 1 W. & T. L. C., 8th ed., p. 259.
(3) [1895] 2 Q. B. 679.
(4) [1902] A. C. 271.
(5) (1883) 22 Ch. D. 604.
(6) [1914] A. C. 932.

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LLOYD v. COOTE & BALL.

HORRIDGE J. This is an action for an account which was tried by one of the official referees, who has found that the defendant is entitled to recover the sum of 150*l.* from the plaintiff. The plaintiff has appealed from the judgment of the official referee, and it is contended on her behalf that the account was taken on a wrong principle and that, if it had been rightly taken, the result would have shown that nothing was due from the plaintiff to the defendant, but that a certain sum was due from the defendant to the plaintiff. The plaintiff is the widow of one George Lloyd, who died in May, 1912. The defendant is a solicitor. The account in question relates to a series of transactions between Lloyd and the defendant spread over a number of years. After Lloyd's death the defendant acted as solicitor for the plaintiff in connection with the winding-up of her husband's estate, and he delivered to the plaintiff an account of his dealings with the deceased man which showed a sum of 563*l.* 16*s.* 1*d.* due to the defendant. The account consisted largely of statute-barred items, and the defendant relies on certain acknowledgments of indebtedness made by the plaintiff as being sufficient to take the case out of the statute. The question which we have to consider is whether the fact that at the time the acknowledgments were given the relationship of solicitor and client existed between the defendant and the plaintiff prevents the defendant from relying on these acknowledgments. The facts with regard to these acknowledgments are as follows: [The learned judge stated the facts as set out above, and continued:] With regard to the affidavit for probate, the case of *In re Beavan* (1) is a direct authority for saying that that affidavit cannot be treated by the defendant as an acknowledgment to him of the debt. Neville J. in deciding *In re Beavan* (1) followed the decision of the Court of Appeal in *Stamford, Spalding and Boston Banking Co.* v. *Smith* (2), where Lord Herschell said "it has been abundantly settled that an acknowledgment to a stranger is not sufficient," and he referred to *Clark* v. *Hooper* (3) as an authority for that proposition. I think, therefore, we are bound to hold the

(1) [1912] 1 Ch. 196. (2) [1892] 1 Q. B. 765.
(3) (1834) 10 Bing. 480.

defendant cannot rely on the affidavit for probate as an acknowledgment which takes the case out of the statute. With regard to the other acknowledgments, there is no doubt they were in such terms that a promise to pay the debt would be implied if they had been made by a debtor to a creditor between whom no fiduciary relationship existed. But the position is that they were given by a lady to her solicitor whose claim against her was statute-barred. The defendant by getting these acknowledgments put himself in the position of being able to recover judgment against the plaintiff as executrix of her husband. It is said this conferred no benefit on the defendant because he held security for his debt which he was entitled to realize. I do not agree. Whether he had security or not, he clearly obtained an advantage by getting from the plaintiff an acknowledgment which enabled him to recover judgment against the estate of the deceased in respect of a statute-barred debt. It is said that, in accordance with the rule which was always applied in the Court of Chancery and which is now universal, it was the duty of the defendant, as the solicitor of the plaintiff, to point out to her that she was not bound to pay out of her husband's estate debts of his that were statute-barred, and that he ought to have told her to obtain independent advice before giving these acknowledgments. The duty of persons dealing with others towards whom they stand in a fiduciary relation is exemplified by the well-known case of *Huguenin* v. *Baseley* (1), and is best expressed with regard to solicitors in *Liles* v. *Terry* (2), where Lord Esher M.R. said: "The learned judge has found, and I believe it to be the truth, that the difference between a deed which would have that effect and a will which would be revocable was fairly and fully explained by the solicitor to her before she executed the deed, so that she did precisely what she intended to do, and that no undue influence whatever was exercised over her. Although that was the case, and although she executed the deed, as I believe, not with the intention of benefiting the solicitor, whom in point of law it did not benefit, but with the exclusive intention of benefiting her niece, yet, as I

(1) 14 Ves. 273; 1 W. & T. L. C., 8th ed., p. 259.

(2) [1895] 2 Q. B. at p. 683.

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understand the doctrine laid down by the Courts of Equity on the subject, there is a positive rule of equity to the effect that, because the solicitor who acted in relation to the execution of the deed was the husband of the plaintiff's niece, and the plaintiff had not the advice of an independent solicitor, therefore the gift which the plaintiff intended to make for the benefit of her niece was invalid; or in other words, according to the authorities by which the rule of equity on the subject is determined, there is in such case a legal presumption of undue influence by the solicitor which cannot be met or rebutted by any evidence." Therefore, if these transactions came within that rule, they cannot stand, because it is not suggested the defendant did advise the plaintiff as to her true position with regard to the statute-barred items in the account, or recommend her to go to another solicitor for advice. The question, therefore, is do these transactions come within the rule? In my opinion they do. A solicitor is not permitted to take a benefit from his client unless he first advises her to take independent advice, and in my opinion the defendant by obtaining these acknowledgments did obtain a benefit within the meaning of the rule, and the acknowledgments cannot stand. The items in question must therefore be treated as statute-barred, unless the account was what is called a running account. [The learned judge proceeded to deal with the other questions raised by the appeal and came to the conclusion that the account was not a running account and that in any case there had been no payment which could operate to take the case out of the statute; and that the security was not deposited with the defendant in respect of the general indebtedness, but only against certain specific advances.] For these reasons I am of opinion that the decision of the official referee was wrong and the appeal ought to be allowed.

ROWLATT J. I am of the same opinion, but I wish to guard myself with regard to the effect of a solicitor receiving from his client an acknowledgment of a statute-barred debt. The doctrine that a solicitor is not permitted to accept any benefit from a client, unless the client has had independent advice in the matter, is well known and is very strictly applied. The question

which we have to decide is whether what took place in this case was a transaction which conferred an advantage on the solicitor within the meaning of the rule. I am not prepared to hold that the mere receipt of an acknowledgment is necessarily an advantage to the solicitor which he is not permitted to retain. I can imagine a case where the client might of his own accord write a letter to his solicitor containing an acknowledgment of a statute-barred debt due to the solicitor, or might voluntarily send money in payment of it, and the circumstances might be such that the solicitor was not precluded from relying on the acknowledgment or bound to return the money. I am, however, clearly of opinion on the facts of this case that the transaction was such as to bring it within the rule. The defendant conceived himself to be owed large sums of money for costs by a deceased client to whom he had never delivered any bills of costs. A large number of the items in the defendant's account were statute-barred. The plaintiff, who was the executrix of the deceased client, did not know of this. The defendant discussed with her the amount of his bill, and, having agreed to make a reduction in the amount, he put forward a claim for the reduced sum, and at his instance the plaintiff gave him three acknowledgments of the indebtedness of her husband's estate to the defendant. He now relies on those acknowledgments to take the case out of the statute. The result of this transaction was that the defendant obtained from the plaintiff, his client, a substantial and valuable advantage. In my opinion the case comes within the principle which is so well known and which has been acted on in numerous cases, and the defendant therefore ought not to be permitted to retain the advantage which he obtained from his client.

Appeal allowed.

Solicitors for plaintiff: *Churchman, Perkins & Co.*
Solicitors for defendant: *Mills & Morley.*

F. O. R.

1914
Nov. 3, 6.

BRANDON HILL, LIMITED *v.* LANE AND ANOTHER. JONES AND ANOTHER, CLAIMANTS.

Bill of Sale—Validity—Deviation from Statutory Form—Joinder of unnecessary Party—Recitals—Affidavit—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.

The grantor of a bill of sale thereby assigned chattels which were his sole property as security for money paid by the grantees in discharge of a liability of the grantor and his wife. The bill of sale contained recitals showing how this liability had arisen. The wife of the grantor was named in the bill of sale as a party and she executed it, but she did not join in the assignment of the chattels or the covenant for payment of principal and interest. The affidavit of execution and attestation did not contain a description of the residence and occupation of the wife:—

Held, that neither the joinder of the wife as a party to the bill of sale, nor the presence therein of the recitals, caused the bill of sale to be void under s. 9 of the Bills of Sale Act of 1882 as not being made in accordance with the statutory form; and that inasmuch as the wife was not the grantor of the bill of sale the affidavit was not defective.

APPEAL from the decision of the county court judge of Cheshire sitting at Birkenhead, in an interpleader issue.

The plaintiffs having recovered judgment against the defendants Charles John Lane and Lily Alice Lane, his wife, certain goods consisting of household furniture were seized under a writ of fi. fa. The goods were claimed by George Henry Jones and Fred Harling, the grantees under a bill of sale by which the goods were assigned to the claimants by way of security as therein mentioned.

The bill of sale was expressed to be made between Charles John Lane of the first part, Lily Alice Lane of the second part, and George Henry Jones and Fred Harling, the claimants, of the third part. It commenced with the following recital:—"Whereas by an indenture of mortgage made January 10, 1913, between the said Lily Alice Lane of the first part, the said Charles John Lane of the second part and George Henry Jones and Fred Harling of the third part the said Lily Alice Lane and Charles John Lane for the consideration therein mentioned did amongst other things jointly and severally covenant with the

said George Henry Jones and Fred Harling to pay to the said George Henry Jones and Fred Harling immediately and forthwith upon notice in writing so to do all moneys which during the continuance of that security the said George Henry Jones and Fred Harling shall be called upon to pay and should pay to Edward Whitley his executors administrators or assigns and also all moneys which might be paid to or advanced for or on account of the said Lily Alice Lane and the said Charles John Lane or either of them by the said George Henry Jones and Fred Harling in respect or on account of or in connection with (inter alia) a policy of assurance in the Equitable Life Assurance Society of the United States numbered 1,799,135 comprising or forming the security or any part thereof intended to be effected by the now reciting presents." The bill of sale then recited that a default had been made in the payment of a premium due under the policy and that notice had been given to Jones and Harling by Whitley to pay the premium and that Jones and Harling had requested Mr. and Mrs. Lane to pay the same, which they were unable to do, and that to avoid legal proceedings C. J. Lane had agreed that if Jones and Harling should pay the premium C. J. Lane would give them the security contained in the bill of sale, and that Jones and Harling had accordingly paid the premium; the bill of sale continued as follows: "Now this indenture witnesseth that in pursuance and consideration of the premises he the said Charles John Lane hereby assigns unto the said George Henry Jones and Fred Harling their executors administrators and assigns all and singular the several chattels and things specifically described in the schedule" by way of security for the amount of the premium, and the bill of sale contained a covenant by C. J. Lane for the payment of the principal sum and interest, and a proviso as to seizure in the usual form.

The bill of sale was executed by both C. J. Lane and his wife; the affidavit of execution contained the description of the residence and occupation of Mr. Lane but not of his wife.

At the trial of the interpleader issue evidence was given that Mrs. Lane was made a party to the bill of sale in order to make it clear that she did not claim the furniture as her property.

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The county court judge gave judgment for the claimants. He held that C. J. Lane was the grantor of the bill of sale and the sole owner of the goods; that the bill of sale was not rendered void as being not made in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, either by reason of the recitals or the joinder of the wife or undue prolixity or on any other ground; and that the affidavit was not rendered defective by the omission of Mrs. Lane's name, inasmuch as she was not the grantor of the bill of sale.

The plaintiffs appealed.

Harold Simmons, for the plaintiffs. A bill of sale is not "made in accordance with" the statutory form if it departs from that form in a material respect. A divergence becomes material if it is calculated to give the bill of sale a legal consequence or effect which it would not possess if it were drawn in the prescribed form: *Ex parte Stanford*, per Bowen L.J. (1) The effect of the wife being a party to this bill of sale was that she was thereby estopped from asserting that the furniture was her property. The instrument therefore had a legal effect different from that which a bill of sale in the statutory form possesses, and consequently the county court judge was wrong in holding that it was made in accordance with that form. A bill of sale in this form is calculated to mislead. It may be conceded that, if the wife cannot be regarded as a grantor of the bill of sale, it was unnecessary that the affidavit should refer to her. [He also cited *Saunders* v. *White*. (2)]

Compston, K.C., and *W. Procter*, for the claimants. The county court judge rightly applied to this bill of sale the tests which have been laid down in the authorities for determining whether a bill of sale is in accordance with the statutory form: *Ex parte Stanford* (3); *Melville* v. *Stringer* (4); *Davis* v. *Burton*. (5) How can it be said that the joinder of the wife as a party caused the instrument to have a legal effect different from that which a bill of sale in the statutory form possesses? The

(1) (1886) 17 Q. B. D. 259, at p. 270.
(2) [1902] 1 K. B. 472.
(3) 17 Q. B. D. 259.
(4) (1884) 13 Q. B. D. 392.
(5) (1883) 11 Q. B. D. 537.

wife granted nothing by the bill of sale and did not enter into any covenant, and the fact that she was a party to it in no way affected its operation as between borrower and lender: *Ex parte Popplewell.* (1) Reliance is placed on the recitals acting as an estoppel against any claim by the wife to the furniture, but recitals in a deed do not operate as an estoppel against a party to the deed in an action not founded on the deed: *Ex parte Morgan* (2); *Fraser* v. *Pendlebury* (3); and even if the act of the wife in becoming a party to the bill of sale could operate as an estoppel, it would be an estoppel by conduct, which could equally well have arisen without the wife being party to the bill of sale, and therefore the bill of sale security would in no way be strengthened by the supposed estoppel.

Simmons replied.

Cur. adv. vult.

1914. Nov. 6. HORRIDGE J. read the following judgment:— This was an appeal from the judge of the county court of Cheshire holden at Birkenhead whereby he decided in favour of the claim of G. H. Jones and Fred Harling, who were grantees under a bill of sale of goods seized by the bailiff of the Birkenhead County Court. In order to ascertain whether the decision was correct or not we have to determine what is the true construction to be placed upon s. 9 of the Bills of Sale Act, 1882, which enacts that a bill of sale made by way of security for the payment of money is to be void unless made in accordance with the form in the schedule. The appellants alleged that the bill of sale in question was not in accordance with the form for the following reason. The wife of Charles John Lane, the person actually assigning the chattels, was made a party and executed it, and the deed contained recitals stating how the liability in respect of which the security was given arises.

In my view the test of whether or not the bill of sale was in accordance with the form must be extracted from the decisions of *Melville* v. *Stringer* (4), *Ex parte Stanford* (5), and *Thomas* v.

(1) (1882) 21 Ch. D. 73.
(2) (1876) 2 Ch. D. 72.
(3) (1861) 31 L. J. (C.P.) 1.
(4) 13 Q. B. D. 392.
(5) 17 Q. B. D. 259.

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Kelly. (1) In *Melville* v. *Stringer* (2) Brett M.R. says: "Whatever may be thought of the wisdom of this legislation, I feel myself bound to come to the conclusion that the object of the statute was twofold; first that the borrower should understand the nature of the security which he was about to give for the debt due from him; and secondly, that a creditor upon merely searching the register should be able to understand the position of the borrower and should not be compelled to go to a solicitor in order to get counsel's opinion as to the meaning of a security already created by the borrower." In *Ex parte Stanford* (3) Bowen L.J. says: "But a divergence only becomes substantial or material when it is calculated to give the bill of sale a legal consequence or effect, either greater or smaller, than that which would attach to it if drawn in the form which has been sanctioned, or if it departs from the form in a manner calculated to mislead those whom it is the object of the statute to protect." In *Thomas* v. *Kelly* (4) Lord Halsbury says: "Further, I think that the 9th section must be construed to enact not only what a bill of sale must contain, but also what it must not contain; so that the statute must be understood to have prohibited bills of sale of personal chattels as security for money to which the form given by the statute is not appropriate."

To deal with the form of the bill of sale in this case, the wife, Lily Alice Lane, does not in any way purport to grant the chattels in question. It was said that the deed being under seal the recitals contained in it would operate by way of estoppel against her. On the cases of *Ex parte Morgan* (5) and *Fraser* v. *Pendlebury* (6) it seems clear that such recitals would only operate by way of estoppel when relied upon for the purpose of enforcing any right created by the bill of sale, but in this case she entered into no contract, and I cannot see why such recitals can be used by way of estoppel against her. The true view of her being joined in the deed seems to me to be the view expressed by Jessel M.R. in *Ex parte Popplewell* (7), where,

(1) (1888) 13 App. Cas. 506.
(2) 13 Q. B. D. at p. 397.
(3) 17 Q. B. D. at p. 270.
(4) 13 App. Cas. at p. 511.
(5) 2 Ch. D. 72.
(6) 31 L. J. (C.P.) 1.
(7) 21 Ch. D. at p. 82.

dealing with the joining of the son, James Storey, who in no way was a grantor, he says the joinder in it of a person who had no interest is mere surplusage.

I am therefore of opinion that the joining of the wife was mere surplusage in this case, and did not, within the words of Bowen L.J. in *Ex parte Stanford* (1), give the bill of sale a legal consequence or effect, either greater or smaller than that which would attach to it if drawn in the form which has been sanctioned, nor do I think the joining of the wife in this case would prevent the borrower from understanding the nature of the security, nor a creditor who searched the register from understanding the position of the borrower. I think, within the words of Lord Halsbury, the transaction is one in respect of which the form given in the schedule is appropriate, and the addition of the wife does not in any way prevent the document from being substantially in the form required by the statute. It may be truly said that the recitals and the fact of the wife joining might be used as evidence of acquiescence so as to prevent her at any future time disputing the validity of the document, but I do not think that this affects the operation of the document in any way as a bill of sale so as to render it different from what it would be if it was in the exact form required by the statute.

A further objection was taken that the affidavit did not set out the residence and occupation of the wife; but she was not a person making or giving the bill of sale within s. 10, sub-s. 2, of the Act of 1878, nor was she a grantor within s. 10 of the Bills of Sale Act, 1882. I do not think there was any occasion to put her residence or occupation in the affidavit.

The decision of the county court judge was in my view correct and ought to be affirmed, and the appeal dismissed with costs.

ROWLATT J. I have read the judgment of Horridge J. and agree with it.

Appeal dismissed.

Solicitor for plaintiffs: *Henry Moore.*

Solicitors for claimants: *Harling, Fisher & Houghton, Liverpool.*

(1) 17 Q. B. D. at p. 270.

F. O. R.

1914
Nov. 25.

THE MAYOR, &c. OF GUILDFORD *v.* BROWN.

Rag Flock—Flock intended for making an Article of Bedding—Flock taken from old Mattress intended to be put into new Cover—Rag Flock Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 52), *s.* 1, *sub-s.* 1.

The respondent had in his possession flock manufactured from rags which did not conform to the standard of cleanliness prescribed by the Local Government Board's regulations. The flock was taken from two old mattresses, and the respondent intended to put the same flock, without any addition to or subtraction from it, into new covers :—

Held, that the respondent had in his possession flock manufactured from rags intended to be used for the purpose of making an article of bedding within the meaning of s. 1, sub-s. 1, of the Rag Flock Act, 1911, and therefore that he was liable to the penalty imposed by the sub-section.

Gamble v. *Jordan* [1913] 3 K. B. 149 distinguished.

Case stated by justices for Guildford.

An information was preferred by the town clerk of Guildford on behalf of the appellants under the Rag Flock Act, 1911 (1), against the respondent Brown for having in his possession on May 22, 1914, flock manufactured from rags intended to be used for the purpose of making an article of upholstery, cushions, or bedding, which flock did not conform to the standard of cleanliness prescribed by regulations made by the Local Government Board.

Upon the hearing of the information the following facts were proved :—

On May 22, 1914, the respondent had in his possession on his premises in Guildford a quantity of flock manufactured from rags, a portion of the flock lying loose by the side of a "mill," and the remainder being contained in a mattress lying on the opposite side of the mill.

On the same date two samples of the flock were taken by an

(1) Rag Flock Act, 1911 (1 & 2 Geo. 5, c. 52), s. 1, sub-s. 1: "It shall not be lawful for any person to sell or have in his possession for sale flock manufactured from rags or to use for the purpose of making any article of upholstery, cushions, or bedding flock manufactured from rags or to have in his possession flock manufactured from rags intended to be used for any such purpose, unless the flock conforms to such standard of cleanliness as may be prescribed by regulations to be made by the Local Government Board, and, if any person sells or uses or has in his possession flock in contravention of this Act, he shall be liable on summary conviction to a fine . . . ."

inspector, one sample being taken from the heap lying loose and the other being taken from the mattress which was cut open for the purpose by an employee of the respondent. Each sample on analysis was found to contain more than three times the maximum amount of chlorine permitted by the Local Government Board's regulations.

The flock from which the two samples were taken was the flock taken from two mattresses which the respondent was remaking for a customer. The flock taken from the two mattresses was intended to be used in remaking the mattresses; it was not, however, to be replaced in the old covers, but was to be placed in new covers. Only the actual flock taken from the two mattresses was intended to be used for this purpose, and it was not to be added to or subtracted from in any way.

For the appellants it was contended that as the flock was to be placed in new covers and not merely removed and replaced in the old covers, the respondent had flock in his possession intended to be used for the purpose of making an article of bedding within the meaning of s. 1, sub-s. 1, of the Act.

For the respondent it was contended that as he was only intending to use the flock in remaking the two mattresses without adding to or subtracting from it, the flock was not in his possession intended to be used for the purpose of making an article of bedding within the meaning of s. 1, sub-s. 1, of the Act.

The justices' attention was called to the case of *Gamble* v. *Jordan*. (1)

The justices, being of opinion that the flock was not in the respondent's possession intended to be used in the making of an article of bedding within the meaning of s. 1, sub-s. 1, of the Act, dismissed the information, but stated this case as to whether they were right in so deciding.

R. M. Montgomery, K.C., for the appellants. In *Gamble* v. *Jordan* (1) the Court clearly indicated that it was an infringement of s. 1 of the Rag Flock Act, 1911, to take flock from an old mattress and put it into a new cover.

[He was stopped.]

The respondent was not represented.

(1) [1913] 3 K. B. 149.

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RIDLEY J., after stating the facts, continued as follows: This prosecution was under the second branch of s. 1, sub-s. 1, of the Rag Flock Act, 1911, by which persons are prohibited from having in their possession flock intended to be used for the purpose of making any article of upholstery, cushions, or bedding, if the flock does not conform to the regulation standard of cleanliness. The evidence shows that the respondent had flock in his possession intended to be used for the purpose of making an article of bedding. In my opinion the justices were therefore wrong in the conclusion they arrived at, and they ought to have convicted the respondent. In the argument before the justices the case of *Gamble* v. *Jordan* (1) was apparently relied on as an authority the other way. In *Gamble* v. *Jordan* (1) it appeared that the flock was taken out of a cover and was to be put back in the same cover, and the Court held that it was impossible to say that, if you take out the contents of a mattress and put them back again, that amounts to the manufacture of a mattress. I think, however, that it is manufacturing a mattress if you take flock out of an old and put it into a new cover. The facts in *Gamble* v. *Jordan* (1) are clearly distinguishable from those in the present case. The appeal must be allowed.

AVORY J. I agree that the justices were wrong and that they ought to have convicted the respondent. It is said that they proceeded upon the authority of *Gamble* v. *Jordan*. (1) That case is really an authority upon which they ought to have convicted the respondent. Phillimore J. at the end of his judgment said this: "The appellant was not making, and did not have flock in his possession for the purpose of making, bedding. I desire to confine myself to the case where a man takes flock out of a mattress and then simply replaces it without any addition whatever. If he were to add anything it would be quite another matter." Bankes J. said that the word "manufactured" meant bringing something into being and that the appellant in that case was not bringing a mattress into being by simply shaking up the contents and putting them back again. In my judgment in the same case I said this: "In one sense a new mattress may

(1) [1913] 3 K. B. 149.

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be made out of a secondhand one; new covering may be put upon old stuffing, or an old cover may be stuffed with new flock. Those are not the operations in question. In my opinion the answer to the question asked by the magistrate is that re-making or re-stuffing as described in this special case is not making any article of upholstery, cushions, or bedding within the meaning of the Act." Therefore I clearly indicated that if a man made a new mattress by putting old stuffing into a new cover that would be within the Act.

LUSH J. I agree, and I only desire to add this, that there is a great difference between re-making an old article and making a new one. It is clear on the facts of this case that the respondent made a new article and therefore he came within the very terms of s. 1, sub-s. 1, of the Act.

Appeal allowed.

Solicitors for appellants: *Sharpe, Pritchard & Co., for A. D. Jenkins, Town Clerk, Guildford.*

J. S. H.

1914

Oct. 14.

LANCASTER, APPELLANT *v.* BURNLEY CORPORATION, RESPONDENTS.

Local Government—Dwelling-house unfit for Human Habitation—Closing Order—Demolition Order—Duty of Local Authority—Appeal—Powers of Local Government Board—Housing, Town Planning, &c. Act, 1909 (9 *Edw.* 7, *c.* 44), *ss.* 17, 18, 39.

By s. 17 of the Housing, Town Planning, &c. Act, 1909, if "any dwelling-house" appears to a local authority to be unfit for human habitation, it shall be their duty to make an order prohibiting the use of the dwelling-house for human habitation (in the Act referred to as a "closing order") until in the judgment of the local authority the dwelling-house is rendered fit for that purpose; and by s. 18, "Where a closing order in respect of any dwelling-house has remained operative for a period of three months," and the local authority are of opinion "that the dwelling-house has not been rendered fit for human habitation, and that the necessary steps are not being taken with all due diligence to render it so fit," the local authority "shall order the demolition of the building," subject to a right of appeal by the owner to the Local Government Board. By s. 39, "on any such appeal the Board may make such order in the matter as they think equitable" and the order of the local authority "may be confirmed, varied, or quashed, as the Board think just."

A closing order was made by a local authority in respect of a dwelling-

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house. No steps were subsequently taken by the owner to render it fit for human habitation, but after the closing order had remained operative for three months the owner made structural alterations in the house for the purpose of converting it into a warehouse, which rendered it incapable of being used as a dwelling-house. The owner also gave notice to the local authority of his intention to convert the house into a warehouse and submitted a plan of the proposed alterations for their approval. The local authority disapproved of the plan and, having duly considered the question of the demolition of the house, made an order for its demolition. The owner appealed against this order to the Local Government Board:—

Held, that as no steps had been taken to render the dwelling-house fit for human habitation there was an imperative duty on the local authority under s. 18, sub-s. 2, of the Act, after the closing order had remained operative for three months, to order the demolition of the house, notwithstanding that it had become incapable of use as a dwelling-house; but that the Local Government Board in determining the appeal had power under s. 39 to take into consideration the fact that it was not the intention of the owner to use the house in future as a dwelling-house, and, if the Board in the exercise of their judicial discretion thought fit, to quash or vary the demolition order on that ground.

SPECIAL CASE stated by the Local Government Board under s. 39, sub-s. 1 (*a*), of the Housing, Town Planning, &c. Act, 1909. (1)

(1) Housing, Town Planning, &c. Act, 1909 (9 Edw. 7, c. 44), s. 17: "(2.) If, on the representation of the medical officer of health, or of any other officer of the authority, or other information given, any dwelling-house appears to them to be in such a state" (i.e., unfit for human habitation) "it shall be their duty to make an order prohibiting the use of the dwelling-house for human habitation (in this Act referred to as a closing order) until in the judgment of the local authority the dwelling-house is rendered fit for that purpose."

Sect. 18: "(1) Where a closing order in respect of any dwelling-house has remained operative for a period of three months, the local authority shall take into consideration the question of the demolition of the dwelling-house, and shall give every owner of the dwelling-house notice of the time (being some time not less than one month after the service of the notice) and place at which the question will be considered, and any owner of the dwelling-house shall be entitled to be heard when the question is so taken into consideration.

"(2.) If upon any such consideration the local authority are of opinion that the dwelling-house has not been rendered fit for human habitation, and that the necessary steps are not being taken with all due diligence to render it so fit, or that the continuance of any building, being or being part of the dwelling-house, is a nuisance or dangerous or injurious

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The facts stated in the case were as follows :—

1. On June 1, 1912, closing orders under s. 17 of the Housing, Town Planning, &c. Act, 1909, were made by the Burnley Corporation (hereinafter referred to as "the corporation") in respect of the dwelling-houses Nos. 2, 4, and 6 on one side and 1, 3, and 5 on the other side of Engine Court, Burnley. The said orders were duly served and under the provisions of s. 39, sub-s. 2, of the Act became operative on October 7, 1912.

2. The said dwelling-houses were purchased by and conveyed to John Fielding Lancaster (hereinafter called "the appellant") on December 17, 1912. The appellant had notice that the closing orders had been made and bought the houses for the purpose of converting them into warehouses. At the date of the purchase Nos. 1 and 3 were let as stores, and the letting was continued by the appellant until May 24, 1913.

3. In or about the month of March or April, 1913, the appellant commenced to make alterations to the dwelling-houses Nos. 2, 4, and 6, Engine Court for the purpose of converting them into warehouses, and on May 10, 1913, notice was given

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to the health of the public or of the inhabitants of the neighbouring dwelling-houses, they shall order the demolition of the building. . . . .

"(4.) Notice of an order for the demolition of a building shall be forthwith served on every owner of the building in respect of which it is made, and any owner aggrieved by the order may appeal to the Local Government Board by giving notice of appeal to the Board within twenty-one days after the order is served upon him."

Sect. 39: "(1.) The procedure on any appeal under this Part of this Act, including costs, to the Local Government Board shall be such as the Board may by rules determine, and on any such appeal the Board may make such order in the matter as they think equitable, and any order so made shall be binding and conclusive on all parties, and where the appeal is against any notice, order, or apportionment given or made by the local authority, the notice, order, or apportionment may be confirmed, varied, or quashed, as the Board think just.

"Provided that—

"(*a*) the Local Government Board may at any stage of the proceedings on appeal, and shall, if so directed by the High Court, state in the form of a special case for the opinion of the Court any question of law arising in the course of the appeal; and

"(*b*) the rules shall provide that the Local Government Board shall not dismiss any appeal without having first held a public local inquiry."

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by the appellant to the corporation of his intention to convert the dwelling-houses Nos. 2, 4, and 6 and 1, 3, and 5 into warehouses, and a plan of the proposed alterations was submitted for approval.

At a meeting of the improvements committee of the corporation held on May 15, 1913, the plan was disapproved on the ground that it showed an intention to build on a highway, and notice of this disapproval was given to the appellant on May 17, 1913. The alterations made to the dwelling-houses Nos. 2, 4, and 6, Engine Court in or about the month of March or April, 1913, were such as to prevent the premises being used as dwelling-houses until further works had been executed or the alterations restored. No alterations had previously to May 24, 1913, been made to the premises Nos. 1, 3, and 5, Engine Court, but the water supply thereto had been cut off at some unascertained time before that date. Between May 24, 1913, and October 4, 1913, these houses had also been so altered as to render them incapable of being used as dwelling-houses until further works had been executed or the alterations restored.

4. On May 24, 1913, notices were duly given by the corporation under sub-s. 1 of s. 18 of the Act that the question of the demolition of the dwelling-houses Nos. 2, 4, and 6 and 1, 3, and 5, Engine Court would be considered by the corporation at the Town Hall, Burnley, on June 25, 1913, and at a meeting of the health committee of the corporation on June 25, 1913, the question was considered by the health committee, and the appellant appeared before them and objected to the making of demolition orders.

5. On July 31, 1913, the corporation, purporting to act in pursuance of s. 18, sub-s. 2, of the Act, ordered the demolition of the said dwelling-houses, and notices of such order were duly served on the appellant on August 7, 1913.

6. On or about August 7, 1913, the appellant again gave the corporation notice of his intention to erect, or convert existing buildings into, warehouses in Engine Street and delivered a modified plan of the proposed works. The plan was duly considered by the improvements committee of the corporation on August 14, 1913, and disapproved on the ground that it showed

an intention to retain and alter buildings in respect of which demolition orders had been made under the Act.

7. On August 26, 1913, the appellant appealed to the Local Government Board (hereinafter referred to as "the Board") against the demolition orders on the ground that he was aggrieved by the demolition orders, and appealed to the Board for protection against the action of the corporation in the matter and to quash the orders on the following grounds, namely:—

(A) That prior to the making of the orders the buildings in question had been demolished or had otherwise ceased to be dwelling-houses or parts of dwelling-houses.

(B) That the continuance of the buildings or parts of buildings then standing on the site of the former dwelling-houses Nos. 2, 4, and 6 and 1, 3, and 5 was not a nuisance or dangerous or injurious to the health of the public or of the inhabitants of the neighbouring dwelling-houses or contrary to the law applicable to warehouses or other buildings not being dwelling-houses.

(C) That if the buildings were pulled down to the ground the only purpose for which the site could be developed was by the re-erection thereon of similar buildings for the purpose of some business, trade, or industry for which there was a present demand.

(D) That the sites of the buildings could not be utilized for the erection of dwelling-houses compliant with the building regulations of the corporation.

(E) That so far as the appellant was aware the medical officer of health had not made any representation to the corporation that the buildings were obstructive buildings within the meaning of s. 38 of the Housing of the Working Classes Act, 1890, and the corporation had not directed any scheme to be prepared for the improvement of the area in which Engine Court and Engine Street were situate under s. 39 of that Act.

(F) That the compulsory destruction of the appellant's buildings was not authorized by the said Acts or either of them and would serve no useful or beneficial purpose, but would be a harsh and oppressive proceeding on the part of the corporation.

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(G) That the corporation had not considered and determined the question of the demolition of the said buildings according to law.

8. At a public local inquiry held by an inspector of the Board on the subject of the appeals the following points of law were submitted by the appellant and the corporation respectively:—

The appellant contended—

(A) That the power conferred upon the corporation by the first part of s. 18, sub-s. 2, of the Act of 1909 to make a demolition order can only be exercised in the case of a house capable of being, or intended to be, used as a dwelling-house at the time when the order is made.

(B) That if subsequently to the making of a closing order the corporation were satisfied that the dwelling-house in respect of which the demolition order was made either had been, or was about to be, altered so as to be incapable of being used as a dwelling-house the corporation should not make a demolition order.

(C) That even if contrary to this contention the corporation were compelled by the Act of 1909 to make a demolition order because the houses had not been made fit for human habitation, it was open to the Board in the exercise of their jurisdiction under s. 39 of the Act to make such order as should seem to them to be equitable.

The corporation contended—

(A) That as the houses had not, either before the expiration of three months from the date when the closing order became operative or at any time, been rendered fit for human habitation, and as at the time when the corporation took into consideration the question of making a demolition order with regard to them no steps were being taken to render them so fit, the corporation had no option under the Act but to make the demolition order in question.

(B) That the jurisdiction of the Board under s. 39 is an appellate jurisdiction only, and that in exercising it the Board are confined to deciding whether or no the corporation properly exercised their powers and duties under the Act, and cannot make any order which the corporation could not properly have made.

It was not suggested that the continuance of the buildings in question was a nuisance or dangerous to the health of the public or of the inhabitants of the neighbourhood.

9. The Local Government Board gave no decision on the appeals and for the purposes of such decision craved the assistance of the Court upon the following questions:—

(1.) Whether when a closing order has been made with respect to a dwelling-house, and the local authority is satisfied either that there is no intention on the part of the owner to use the house as a dwelling-house, or that the house has been so altered, (*a*) before the expiration of three months from the closing order becoming operative, (*b*) after the expiration of such three months and before notice given by the local authority of intention to consider the question of demolition, (*c*) after such notice given and before a demolition order is actually made, as to become incapable of use as a dwelling-house, the local authority are (1.) entitled or (2.) bound to make a demolition order with respect to it.

(2.) Whether in the exercise of their jurisdiction under s. 39 of the Act the Board have power, notwithstanding that the local authority may be bound to make a demolition order, to quash, vary, or suspend such order or to make such other order as they may consider equitable in the circumstances of the particular case.

Branson, for the Local Government Board, said that this was the first special case which had been stated by the Board under s. 39 of the Housing, Town Planning, &c. Act, 1909. The Board were charged with the duty of administering the Act and were therefore interested in the decision of the Court, and the Board claimed the right, if they thought fit, to be heard on the questions raised by the case. In the present case, as both parties were represented, it would probably be unnecessary for him to add anything to their arguments, but it might happen in some future case that one or other of the parties did not appear, and he desired to guard against anything being said by the Court which could be used as a precedent against the right of the Board to be heard.

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Brooke Little, for the appellant. Under s. 18 of the Act it is a condition precedent to the making of a demolition order by a local authority that a closing order in respect of a "dwelling-house" has remained operative for three months, that "the dwelling-house" has not been rendered fit for human habitation, and that the necessary steps are not being taken to render it fit, or that it is a nuisance or dangerous or injurious to the health of the public. It follows that there is no power to make a demolition order if, as is the case here, the dwelling-house in respect of which the closing order was made has subsequently undergone such alteration that it has ceased to exist as, and is no longer capable of being used as, a dwelling-house. In these circumstances there is no longer in existence a "dwelling-house" in respect of which a closing order "has remained operative for a period of three months," within the meaning of s. 18, sub-s. 1. An order cannot be operative with respect to something which is non-existent. The object of this part of the Act was to prevent buildings which are unfit for human habitation being used as dwelling-houses. If a particular building which was once a dwelling-house has by reason of structural alteration become incapable of being used as a dwelling-house, there is no reason why it should be demolished.

Secondly, even if, in the circumstances of this case, the local authority were bound to make a demolition order, the Local Government Board have power on the appeal under s. 39 to vary or quash the order "as the Board think just," and to make such order "as they think equitable."

S. G. Turner, for the Burnley Corporation.

[LORD COLERIDGE J. The Court only desires to hear you on the second point.]

The jurisdiction given by s. 39 to the Local Government Board is an appellate jurisdiction. The appeal is in the nature of a rehearing, and if in the opinion of the Board the facts disclosed show that the demolition order was wrongly made by the local authority, the Board have power to vary or quash it. The administration of this part of the Act has been entrusted to the local authorities, and the Legislature cannot have intended that, where a local authority have rightly made an order under s. 18

for the demolition of a dwelling-house, the Local Government Board should have power under s. 39 to quash the order, for that would in effect be giving power to the Board to repeal the Act. The language of the section must clearly be read subject to some limitation. The object of using the word "equitable" was probably to enable the Board to prevent injustice from being done through some technical non-compliance with the provisions of the Act.

LORD COLERIDGE J. said that the Court did not think that the Local Government Board had any right to be heard, but they were willing to hear anything which counsel for the Board might desire to say, as amicus curiae, on the question of the limitation of the powers of the Board in deciding appeals under the Act.

Branson. In this case I do not desire to add anything to the arguments which counsel for the parties have addressed to the Court.

LORD COLERIDGE J. This case raises an important question with regard to the respective powers of a local authority and the Local Government Board under the Housing, Town Planning, &c. Act, 1909, in respect of orders for the closing and demolition of dwelling-houses. [The learned judge stated the facts and read ss. 17 and 18 of the Act, and continued:]

The first question which we have to consider is whether in the circumstances of this case, the closing order having remained operative for three months, and no steps having been taken to render the dwelling-house fit for human habitation, the local authority were, under the Act, bound to order the demolition of the houses. It is said on behalf of the appellant that if, as the fact was, there was an intention manifested on the part of the owner of the houses to convert them into warehouses and not to use them any longer as dwelling-houses, and if the local authority were satisfied that that was so, then the local authority were not bound as a matter of course to make a demolition order, but had a right to consider the intended altered use of the premises, and

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thereupon to exercise a jurisdiction in that regard. I am of opinion that, if the provisions of sub-s. 2 of s. 18 of the Act have not been complied with when the closing order has remained operative for a period of three months, there is no discretion on the part of the local authority, and that the Act imposes upon them a duty to order the demolition of the dwelling-houses in question. That answers all three branches of the first question asked by the case as to the limitation of the powers of the local authority.

That state of things may of course in some cases give rise to hardship, and the Act has therefore provided a remedy by way of appeal to the Local Government Board under s. 39, sub-s. 1, of the Act. The second question in the case asks what is the proper exercise of the Board's jurisdiction under that section. It is suggested that the right of appeal is simply an ordinary appeal giving the Board no further equitable jurisdiction than is common to all appeals; that the Board may, for instance, consider the question as to whether the houses are or are not in a sanitary condition and may, if they think fit, overrule the decision of the local authority on that question of fact, but that, except upon grounds of that kind, they have no jurisdiction to set aside a demolition order which has been made by the local authority compulsorily, so to speak, in accordance with the provisions of the Act. But when one reads the language of s. 39, sub-s. 1, it is difficult to conceive what wider discretion and jurisdiction the Legislature could have conferred upon the Board, because, instead of saying that there should be a right of appeal to the Board on questions of fact and that the Board might do what was right in the circumstances, or words to that effect, the Act uses this language: "on any such appeal the Board may make such order in the matter as they think equitable," and the section goes on to say that the order "may be confirmed, varied, or quashed, as the Board think just." That language seems to me to confer very wide powers on the Local Government Board, and to give them a discretion, if they think fit, to rescind an order for demolition upon any reasonable ground, exercising a judicial discretion in the matter. It certainly seems to me that it would cover such a case as the present one, if the Board were

satisfied that the houses were no longer going to be used for human habitation, but were going to be turned to some other purpose which was not inconsistent with the provisions of the Act. It may be that in some cases the Board might think that that was a satisfactory arrangement, but there might be other cases in which, owing to the harshness of displacing poor people and forcing them to go further afield to find dwelling-houses, the Board might think fit to say that the particular locality was one in which it was necessary for the poor to live and where they must be housed in habitable dwellings, and the Board might regard the ownership of insanitary dwellings as a matter so contrary to public policy that the owner must be compelled to render them sanitary even though it involved some hardship, in one sense, upon him. We do not, however, desire to enter into those larger questions. For my part I only desire to say that I think the policy of the Act is to confer upon the Local Government Board the widest possible discretion that language can confer upon them to do what is equitable, and to confirm, vary, or quash the order of the local authority as, in the exercise of their reasonable discretion, they may think right.

That answers the second question raised by the case. The question uses the word "suspend," but that word is not in s. 39 and should therefore be omitted. The power given to the Board by s. 39 is to confirm, vary, or quash.

HORRIDGE J. In this case an order was duly made for the closing of certain dwelling-houses by the local authority; and at the expiration of the time during which that order ran, the question whether or not a demolition order should be made came for consideration before the local authority. It was contended that because at some period prior to the consideration of that matter an intimation had been given by the owner of the houses that they were not going to be used in future as dwelling-houses, therefore an order for their demolition could not be made. That depends entirely on s. 18 of the Act. The first words of sub-s. 1 of s. 18 are "Where a closing order in respect of any dwelling-house has remained operative for a

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period of three months." The word "dwelling-house" is in my view intended to apply to the dwelling-house as it existed at the time when the closing order was made; and in order that the appellant may succeed, his contention must be that the "dwelling-house" there referred to is the dwelling-house at the time when the order to demolish is under consideration. I do not agree with that contention. I do not think that it makes any difference at all that between the order to close and the order to demolish there was an intimation that the houses were not going to be used as dwelling-houses. If the provisions of s. 18 are not complied with, it is, in my opinion, the imperative duty of the local authority to make the order for demolition, even though in the interval between the closing and demolition orders there has been an intimation that the house is not going to be used as a dwelling-house.

But, when there is an appeal to the Local Government Board, I think the Legislature have by s. 39 intentionally given the Local Government Board a wider jurisdiction than would have been given if it had been intended that the Board should act merely as an appellate tribunal. The jurisdiction of the Board, in my view, includes the exercise, of course in a proper judicial manner, of their discretion as to whether or not it is a fit case for confirming the order. If they think that the case is one of hardship, and that the order ought not to be confirmed, I think then that, under the equitable jurisdiction which is given to them by the section, they have the right to vary or quash the order. I am very careful not to say that in this particular case they should do either one thing or the other, either confirm the order or quash it or vary it, but I am quite clear that, if they think right, they have the power to vary or quash the order. Whether the word "vary" includes "suspend" or not, I think we need not consider, because it is better to answer the questions in the case in the words of the section. Therefore, the second question, as it seems to me, ought to be answered as follows: That the Local Government Board have power, notwithstanding that the local authority may be bound to make a demolition order, to quash or vary such order if they consider it equitable to do so in the circumstances of the particular case.

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SHEARMAN J. I am of the same opinion. I agree so entirely with the judgments which have been delivered that I do not think I can usefully add anything.

Solicitors for appellant: *Littledale & Lefroy, for Southern, Fullalove & Ritchie, Burnley.*

Solicitors for respondents: *Mellor & Co., for Peregrine Thomas, Burnley.*

Solicitors for Local Government Board: *Sharpe, Pritchard & Co.*

F. O. R.

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Nov. 24.

Licensing Acts—Offences—Sale during Prohibited Hours—Beer ordered and paid for at Night—Purchaser taking away Beer next Morning during Prohibited Hours—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 & 1 *Geo.* 5, *c.* 24), *s.* 61.

A man called at the respondent's licensed premises at 8 o'clock on a Sunday evening, handed to the respondent a quart bottle, and asked that it should be filled with beer and put out in the stable yard that night so that he could call for it and take it away with him while on his way to work next morning before the premises opened. The beer, which was paid for at the time it was ordered, was filled by the respondent into the bottle and placed in the stable yard, which was within the curtilage of the licensed premises, on the same evening. The purchaser called for and took away the beer before the licensed premises were open on the Monday morning. An information against the respondent, under s. 61 of the Licensing (Consolidation) Act, 1910, for having unlawfully opened his licensed premises on the Monday morning for the sale of intoxicating liquors during prohibited hours was dismissed by the justices:—

Held (Avory J. dissenting), that the justices were right in dismissing the information as the whole transaction of sale was completed when the beer was placed in the stable yard on the Sunday night.

Saunders v. *Thorney* (1898) 78 L. T. 627 and *Noblett* v. *Hopkinson* [1905] 2 K. B. 214 distinguished.

CASE stated by Sussex justices.

An information was preferred by the appellant Bristow under the Licensing (Consolidation) Act, 1910, against the respondent Piper for having on May 25, 1914, unlawfully opened his licensed premises for the sale of intoxicating liquors during prohibited hours.

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On the hearing of the information the following facts were proved:—

Piper was the holder of a justices' licence in respect of the premises known as the Wyndham Arms, Rogate, in the county of Sussex, the hours of closing of which licensed premises were according to paragraph C of the Sixth Schedule of the Licensing (Consolidation) Act, 1910.

On the evening of Sunday, May 24, 1914, about 8 o'clock, a man named Brider called at the Wyndham Arms and handed the respondent a quart bottle, which he asked should be filled with beer and put out in the stable yard that night so that he could call for it and take it away with him to his work next morning before the house opened. The beer was paid for at the time it was ordered.

The bottle was filled by the respondent and placed in the stable yard the same evening. The stable yard was within the curtilage of the premises.

At 5.37 A.M. on Monday, May 25, 1914, Brider came and took the said quart bottle of beer from the stable yard.

For the appellant it was contended:—

(*a*) That as the time of the taking of the beer by Brider was 5.37 A.M., on Monday, May 25, 1914, that was the time of the delivery of such beer; (*b*) that as the beer was actually delivered during prohibited hours on May 25, 1914, and that it was a term of the contract between the respondent and the buyer that delivery should take place during prohibited hours, the respondent was liable to be convicted under s. 61 of the Licensing (Consolidation) Act, 1910. (1)

For the respondent it was contended:—

(*a*) That on the appellant's own showing and on the evidence given on behalf of both parties there was a complete appropriation of the beer on the night of May 24, namely: (i.) The

(1) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 61, sub-s. 1: "If any person during the time at which premises for the sale of intoxicating liquors are directed to be closed by or in pursuance of this Act, sells or exposes for sale in those premises any intoxicating liquor, or opens or keeps open those premises for the sale of intoxicating liquors . . . . that person shall be liable in respect of each offence to a fine . . . ."

putting of the beer into Brider's (the purchaser's) own bottle; (ii.) By the placing of the beer, on May 24, in the agreed place, namely, just inside the yard gate or doors; (iii.) That this was borne out by Brider's statement in cross-examination that if any accident had happened to the bottle or the beer, the loss would have been his and not the respondent's.

(*b*) That there was a sale and delivery complete in itself on the 24th, and the mere taking away on the 25th was no part of the delivery;. in fact, that the beer was delivered at the moment it was placed behind the gate.

(*c*) That as the respondent's house was shut and locked at the time Brider arrived at 5.37 A.M. of the 25th—the respondent getting up at 6.30 A.M., about which time the house was opened—and as intoxicating liquor was kept in the house only there could have been no opening of the house for the sale of such liquor during closed hours.

(*d*) That a house must be really "open," in ordinary parlance, before there could be a conviction, and that in this case it was proved that the house was closed, and that no one could have obtained intoxicating liquor at the time Brider removed the bottle from the yard.

The justices being of opinion that there was a doubt whether the sale and delivery were not complete on Sunday, May 24, 1914, gave the respondent the benefit of the doubt, and dismissed the information.

The question for the opinion of the Court was whether the justices, upon the above statement of facts, came to a correct determination and decision in point of law, namely, that it was doubtful if it would not be held that the sale and delivery were complete on May 24.

George Elliott, K.C., and *John Flowers*, for the appellant. An offence was committed under s. 61 of the Licensing (Consolidation) Act, 1910, and the justices ought to have convicted the respondent. The mere fact that a contract of sale in respect of the beer was completed on the Sunday night is not a sufficient answer if any material part of the transaction was left over, such as the essential part of the transaction, namely, delivery. This was

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put quite clearly by Channell J. in *Saunders* v. *Thorney* (1), when he said, "A person opens his licensed premises within the meaning of the section when he opens them for the carrying out of any material part of the transaction of sale." That view was approved and applied in *Noblett* v. *Hopkinson*. (2) So long as it is necessary for the purchaser to enter the licensed premises to obtain the intoxicating liquor, a material part of the transaction remains to be carried out; there is an opening of the premises for sale within s. 61.

[LUSH J. In *Noblett* v. *Hopkinson* (2) the bargain was that the barman should take the beer to the customer outside the licensed premises. Till that was done the contract was not completed. In this case was there not a complete delivery of the beer on the Sunday night in the sense that if the beer was stolen the risk would be on the purchaser?]

Lord Alverstone C.J. in *Noblett's Case* (2) said that in such circumstances the loss would fall on the vendor.

H. du Parcq, for the respondent. Unless one refines upon the language of s. 61 it is impossible to say that the respondent's premises were open for the sale of intoxicating liquor. Channell J.'s observation in *Saunders* v. *Thorney* (1), although entitled to the greatest respect, was not necessary for the decision. In that case Lord Russell C.J. was careful to state at the beginning of his judgment that he was giving his decision upon the exact facts of the case, and the ratio decidendi was that there had been no appropriation of beer to the customer. In this case it is clear that the possession of the beer was transferred to Brider when it was placed in the stable yard on the Sunday night. It was immaterial at what time he would call for it; he might have called for it either the next morning or a week later. The transaction was completed when the bottle was placed where Brider asked that it should be put. In *Saunders* v. *Thorney* (1) and in *Noblett* v. *Hopkinson* (2) the position was different, as there the contract was not complete till the next morning. The position is exactly the same as if Brider on the Sunday night had taken the bottle when filled and had himself placed it where it was in fact placed. No question could have been raised if that had been done. In

(1) 78 L. T. 627. (2) [1905] 2 K. B. 214.

Brewer v. *Shepherd* (1) Cockburn C.J.'s judgment is in favour of the respondent's contention. There the facts were that a man was seen by a policeman to go into a beerhouse after 10 o'clock, the hour for closing, and to come out with a bottle of beer. He afterwards explained that he had left the bottle before 10, ordering it to be filled, and then went to get shaved, after which he only called for the bottle. The justices having convicted the beer-house keeper of keeping open his house for the sale of beer after 10 o'clock, the Court held that there was some evidence that the offence had been committed, but Cockburn C.J. after stating this said: "It might be that the policeman did not see the man go into the house, and that he had gone into the house before 10 o'clock, and gone out after that hour. If that had been so, there would have been no evidence of the offence of keeping open the house for the sale of beer after 10 o'clock."

George Elliott, K.C., in reply. If the argument for the respondent is sound there is no distinction between leaving the bottle of beer in the stable yard, which is within the curtilage and into which the purchaser must enter, and leaving the bar of the public-house open in which is a quantity of beer purchased the night before. That is not a position which will commend itself to the Court.

[LUSH J. That is one extreme. Let me put this: Suppose Brider bought the beer and took it away but came back within a few minutes and said, "May I leave this in your yard?" If he left it there that night and came next morning and took it away before opening hours, could the licensee be said to have kept open his premises for the sale of intoxicating liquor?]

Yes, if part of the arrangement was that he should keep the beer for the customer. With regard to the case of *Brewer* v. *Shepherd* (1), Cockburn C.J.'s observations were merely obiter and were not regarded by Lord Russell C.J. in *Saunders* v. *Thorney* (2) as binding.

AVORY J. In this case I have the misfortune to differ from the conclusion arrived at by Ridley and Lush JJ. The question raised is whether the respondent's licensed house was, within

(1) (1872) 37 J. P. 102. (2) 78 L. T. 627.

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the meaning of s. 61 of the Licensing (Consolidation) Act, 1910, open on the Monday morning at 5.37 for the sale of intoxicating liquor. That the premises were open within the meaning of the section appears to me to be beyond doubt. In the case of *Jeffrey* v. *Weaver* (1) Bruce J. said (at p. 454) that the test whether licensed premises were open, within the meaning of the corresponding section of the old Act, was, whether there was means of access to the interior of the premises from the outside. I adopt that, and say that in this case, it being found as a fact that the stable yard was within the curtilage of the licensed premises, which I understand to mean was part of the licensed premises, it is clear that they were in fact open within the meaning of the section. The next question is, were they open for the sale of intoxicating liquor? Construing the section for this purpose I think it is necessary to bear in mind what was said by this Court as far back as 1896, and to my knowledge acted upon frequently since, namely, that "the provisions of the Licensing Act were not framed with a regard to the niceties which sometimes enter into the consideration of a contract for goods sold and delivered." That was the language of Wills J. in *Pletts* v. *Beattie* (2), and Wright J., in the same case, agreed with that view and said (p. 524): "Enough has been done to satisfy the language of the statute, which is not to be construed with excessive legal nicety as to what constitutes a sale." Applying that principle to the present case, I have come to the conclusion that these premises were open for the sale of intoxicating liquor within the meaning of s. 61.

It appears to me quite impossible to distinguish this case in principle from *Noblett* v. *Hopkinson*. (3) I am not called upon to express my own independent judgment on this question if I find a decision of this Court which is binding upon me and which cannot be distinguished in principle from the present case. That is my view of *Noblett* v. *Hopkinson*. (3) It has been suggested that there is a difference, and I admit that there is a difference in the facts. There never have been two cases identically the same in the facts. In *Noblett* v. *Hopkinson* (3)

(1) [1899] 2 Q. B. 449. (2) [1896] 1 Q. B. 519, at p. 523.
(3) [1905] 2 K. B 214.

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the beer was in fact delivered by the barman who took it from the premises and to some other place and gave it to the purchaser. In the present case the purchaser fetched the beer from the stable yard. I am unable to see any distinction in law between the two cases. In the present case the transaction comes precisely within the words used by Channell J. in *Saunders* v. *Thorney*. (1) It is quite true that the judgment of Lord Russell C.J. in that case turned upon the question whether there had been an appropriation of the goods, but Channell J. said, expressing his view of the construction to be placed upon this section: "I think a person opens his licensed premises within the meaning of the section when he opens them for the carrying out of any material part of the transaction of sale." If that had stood alone it might have been said that it was not necessary for the decision, and therefore might be treated as an obiter dictum; but it was expressly adopted by the majority of this Court in *Noblett* v. *Hopkinson*. (2) In that case Lord Alverstone C.J. in terms adopted Channell J.'s language as being a correct exposition of the law, for after quoting Channell J.'s words he said: "Personally, I adopt that view, and think that if any part of the bargain of sale involves the opening or keeping open of the premises for delivery of the goods on Sunday, the case falls within the mischief of the section." It appears to me that in the present case not only was it a material part of the transaction of sale that Brider should fetch the beer from the licensed premises during the hours that they ought to be closed, but it was a term of the contract of sale that he should do so. It is said in answer to that that the delivery of the goods was in fact complete on the Sunday night when the bottle was put in the stable yard. It may be that if it were a question at what time the property in the beer passed or at what time there was a delivery for the purposes of the Sale of Goods Act, that answer would be perfectly correct; but in my opinion it is not correct to say that for the purpose of a sale under the Licensing (Consolidation) Act, 1910, the whole transaction was complete and the whole delivery complete when in point of fact the purchaser did not obtain possession of the beer until the Monday

(1) 78 L. T. 627. (2) [1905] 2 K. B. 214, 219.

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morning, at a time when the premises should have been closed. For these reasons I consider myself bound by the decision of the majority of the Court in *Noblett* v. *Hopkinson* (1) to hold that these premises were in fact open for the sale of beer within the meaning of s. 61 during prohibited hours.

I desire to add that I also feel bound by the judgment of Kennedy J. in *Noblett's Case* (1) when in dealing with the question of appropriation he said: "I confess that I should go further, and, as at present advised, should be prepared to hold that, if on a Saturday night a man were to point to one in a row of bottles in the bar of a public-house and say that he wanted that particular bottle and would pay for it now but it must be delivered to-morrow during prohibited hours, the so delivering it would be carrying out an essential part of the transaction of sale and the case would be within the section, although in such a case there would be an appropriation of the chattel."

For the reasons I have given I think the justices ought to have convicted the respondent, and therefore that the appeal should be allowed.

LUSH J. Stated very briefly the question we have to decide is this: were the justices bound upon the facts stated by them to convict the respondent of an offence under s. 61 of the Licensing (Consolidation) Act, 1910? The justices did not convict the respondent. They say they were of opinion that there was a doubt whether the sale and delivery were not complete on Sunday, May 24, 1914, and gave the respondent the benefit of the doubt; and the question they have submitted to us is in this somewhat curious form, namely, whether they came to a correct determination and decision in point of law in holding that it was doubtful if the sale and delivery were complete on May 24. I take that to mean that if the justices, upon the facts as they have found them, were bound to convict, then this Court is asked to say so; but, if it was open to them not to convict, the matter rests where it is and the information is dismissed.

I think the language of s. 61 furnishes a clue to the decisions which have been cited. The word "sale," especially when used

(1) [1905] 2 K. B. 214, 222.

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in the Licensing Acts, constantly gives rise to some doubt owing to the ambiguity of its meaning. The word may refer to a sale in which the property passes and nothing more. A plaintiff brings an action for the price of goods upon a bargain and sale of goods. The property passes, but delivery is not a condition precedent to the obligation on the part of the purchaser to pay. The word is also frequently used as a short way of describing a sale in the ordinary sense, a sale completed by delivery. In that case if an action were brought for goods sold and delivered the delivery would have to be proved. We have to see what the word means in the particular context. We therefore turn to the cases to see what interpretation has been placed upon s. 61 in reference to the question, what constitutes a sale, or what constitutes the opening of licensed premises for the sale of intoxicating liquor.

In *Brewer* v. *Shepherd* (1) the facts were shortly these: a man was seen to go into a public-house after closing hours and to come out with a bottle of beer. He afterwards explained that he had left the bottle before closing hours, ordering it to be filled, and then went to get shaved, after which he only called for the bottle. The Court held that there was some evidence that an offence had been committed by the beerhouse keeper in keeping open his house for the sale of beer after closing hours. If one turns to the judgment it seems to me, if I may say so with all respect to the passage referring to it in *Saunders* v. *Thorney* (2), to be difficult to avoid coming to the conclusion that if the man had only gone to fetch the beer which had been already bought, there would have been no offence, and that what was decided was that there was some evidence that the actual purchase was made after closing hours.

In *Saunders* v. *Thorney* (2) it is very material to see what the facts were in order to appreciate Channell J.'s judgment. In that case a person on a Saturday evening ordered from a beer-house keeper, and paid for, some beer. By arrangement the bottles were to have been delivered on the Saturday. By some accident they were not delivered on that evening, and on the Sunday, during closing hours, the purchaser of the beer sent

(1) 37 J. P. 102. (2) 78 L. T. 627.

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Lush J.

his servant for the bottles and obtained them. It was held that the beerhouse keeper having delivered beer during prohibited hours had opened his house for the sale of intoxicating liquor. To understand and appreciate the judgments it is necessary to observe that the Court there held that the property had not passed, which is quite a different thing from delivery. There was no appropriation of any specific goods, and if that was so, there was no sale at all until the Sunday morning. It was on the ground that there had been no appropriation that Lord Russell C.J. held that there was no sale on the Saturday, and consequently that the sale was during prohibited hours on the Sunday. Lord Russell also said this which is important, because it is a limitation on the judgment: "It is perfectly clear that, if publicans were to be at liberty to say, 'It is true we opened our house on the Sunday, but we did so only under and for the purpose of carrying out antecedent contracts'—contracts made without any specific appropriation of the goods—that would open a very wide door to evade what we must take to be the real object of the Legislature in these licensing matters." In other words, if one finds that there has been no passing of property, no appropriation of goods during open hours, it would open a very wide door to an evasion of the Act. To my mind it is vital in order to appreciate the judgment of Channell J., who agreed with Lord Russell, to recognize this fact that there had been no sale at all, no appropriation of the goods during open hours. That being so, Channell J. said this: "I think a person opens his licensed premises within the meaning of the section when he opens them for the carrying out of any material part of the transaction of sale." Inasmuch as the house in that case was open during prohibited hours on the Sunday in order that the beer might be appropriated it was manifest that there had been no sale till the Sunday, and it was in reference to that fact that Channell J. gave his judgment. That judgment received the approval of the Court, and was acted upon, in *Noblett* v. *Hopkinson*. (1) In the latter case it is manifest from the statement of facts (on p. 215) that it was a term of the contract that the delivery of the beer should be effected by the licensee on the Sunday. It is quite true that that

(1) [1905] 2 K. B. 214.

is consistent with the property having passed the night before, but it was a term of the contract that delivery should take place during prohibited hours, and the Court dealt with the case upon that footing. Lord Alverstone C.J., whose statement on p. 219 that the purchasers were to call for the beer on the Sunday morning seems scarcely consistent with the statement on p. 215 that the beer was to be sent to them, came to the same conclusion as was come to in *Saunders* v. *Thorney* (1), namely, that the property had not passed on the Saturday, that there had been no appropriation, and consequently that there had been no sale at all on that day. In order to deal with the question what would be the law if there had been an appropriation and a passing of property, Lord Alverstone and the other judges proceeded to consider whether if the delivery under the contract was to take place by the licensee during prohibited hours there would or would not be an offence against the section. In other words the Court were considering the question whether "sale" was used in the strictest sense or in the widest sense. Upon that question Lord Alverstone came to the conclusion that if delivery of the beer was to be effected during prohibited hours an offence was committed against the section. Kennedy J. agreed with that view, and in the passage which has been read from his judgment he said no more than that. It is as well to point out, in regard to the illustration he gave of bottles of beer being left in a row in the bar, that he expressly said that if the purchaser said he wanted a particular bottle, would pay for it now, and that it must be delivered to-morrow during prohibited hours there would be an offence, and this clearly to my mind points to this, that the word "sale" must be read in the wider sense, and if part of the contract is that delivery is to be given during prohibited hours there is an offence. That judgment does not go any further than this, that the section is contravened if the purchaser buys the beer, as far as the passing of the property is concerned, but stipulates that the delivery shall be effected during prohibited hours.

Turning now to the facts of this case: was it a term of the contract that the vendor should deliver the beer during prohibited

(1) 78 L. T. 627.

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hours? That the property passed I do not doubt, but what was the contract, and where was the delivery under the contract? I quite agree that the word "sale" is not to be construed with the strictness that it receives under the Sale of Goods Act, but there must be some limitation on the word even in the Licensing Acts. One must have some regard to what delivery means. In this case the stipulation between the vendor and the purchaser was that the bottle was to be put in the stable yard for, and at the risk of, the purchaser. In my opinion, the beer was not only sold in the strictest sense, but was delivered by being put in the stable yard. What part of the transaction of sale was left? Absolutely none. The case is precisely the same as if the purchaser had taken the bottle into the yard himself, left it there and called for it the following morning. No one would contend in such circumstances that the beer was delivered on the Monday morning. I think it was open to the justices to find that the true view was that there was no delivery on the Monday as the whole transaction was completed during legitimate hours on the Sunday night. The justices were therefore right in dismissing the information and I think therefore that this appeal should be dismissed.

RIDLEY J. In this case I agree with the view expressed by Lush J. in holding that the justices' decision must be supported. These cases are running into great niceties, and distinctions have been drawn which have gone quite far enough. In this case I think there was no sale during prohibited hours, and no one, in my opinion, unaided by the previous decisions, would hesitate to take that view. That, however, is not sufficient for the determination of this case. We have to see whether we are bound by the governing principles of any of those previous cases and in particular by the decision in *Noblett* v. *Hopkinson*. (1) It is important, in considering whether there has been a sale or not, to ascertain whether or not there has been an appropriation of goods. I stated that in *Noblett* v. *Hopkinson* (1), and I think that was the principle upon which *Saunders* v. *Thorney* (2) proceeded. In those cases there had been no appropriation of the beer on the

(1) [1905] 2 K. B. 214. (2) 78 L. T. 627.

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Saturday; there was none till the Sunday; "the matter rested, therefore," said Lord Russell C.J. in *Saunders* v. *Thorney* (1), "entirely in contract, and no property passed under or by virtue of that contract. Then on the Sunday the house was opened for the delivery of goods in respect of which there had been no appropriation and no property had passed." He held that that was sufficient to justify the justices coming to the conclusion that the house had been opened for sale during prohibited hours because the vendor was appropriating and delivering goods under the contract previously made. Channell J. said: "I think a person opens his licensed premises within the meaning of the section when he opens them for the carrying out of any material part of the transaction of sale." Observe that it was a material part of the transaction of sale that the goods should be appropriated in respect of the contract already made. No one would deny that, and that is the subject-matter with which he was dealing. Although the bargain began the previous day, still a material part of the transaction of sale remained to be completed, and therefore there was, within the meaning of the section, an opening of the premises for the purpose of the sale of intoxicating liquor. That decision was followed in *Noblett* v. *Hopkinson*. (2) There Lord Alverstone said this: "Personally, I adopt that view"—that is the view expressed by Channell J.—"and think that if any part of the bargain of sale involves the opening or keeping open of the premises for delivery of the goods on Sunday, the case falls within the mischief of the section." He adopted the principle and applied it to the facts before him in *Noblett's Case* (2), which were not exactly as they are here and not exactly as they were in *Saunders* v. *Thorney*. (1) In *Noblett's Case* (2) an arrangement was made whereby the bottle having been bought on Saturday night was to be taken by the barman to the brewhouse stable within the curtilage, and he was to deliver it, as he did, in the morning within prohibited hours. That was the bargain, and that bargain was not complete until the bottle was actually handed over on the Sunday morning. "There was," as Kennedy J. said (at p. 222), "merely a contract for the sale of a certain quantity of beer to be delivered from the

(1) 78 L. T. 627. (2) [1905] 2 K. B. 214.

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Ridley J.

premises during prohibited hours." That cannot, in my view, be said of the facts in the present case. Here Brider gave the respondent a quart bottle and asked that it should be filled with beer and put out in the stable yard that night so that he (Brider) could call for it and take it away with him next morning. The business between Brider and the respondent was completed on the Sunday night. I cannot assent to the view that, because what subsequently happened was before 6 o'clock on the Monday morning and in a part of the licensed premises, there was something done during prohibited hours which was a material part of the transaction. The decision in *Noblett* v. *Hopkinson* (1) went perhaps as far as it is desirable that such cases should go. We have said, and I adhere to this, that if a material part of the transaction of sale remains as part of the bargain to be completed during prohibited hours, then there is a breach of the section, but if the facts show that the sale has been completed during legitimate hours, the case does not come within the principle of *Saunders* v. *Thorney* (2) and *Noblett* v. *Hopkinson* (1), but is in a different category. In my opinion the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Walmsley & Stansbury, for J. E. Dell, Brighton.*

Solicitors for respondent: *Woodham Smith & Borradaile, for J. A. Morris Bew, Chichester.*

(1) [1905] 2 K. B. 214. (2) 78 L. T. 627.

J. S. H.

[IN THE COURT OF APPEAL.]

C. A.
1914
Nov. 6.

In re ALLEN.
Ex parte SHAW.

Bankruptcy—Married Woman—Carrying on Trade or Business—Liability for Negligence of Servant in Course of Trade—Liability in Tort—Trade Obligation—Bankruptcy and Deeds of Arrangement Act, 1913 (3 & 4 *Geo.* 5, *c.* 34), *s.* 12.

A married woman while carrying on business incurred a liability in damages in respect of an accident caused by the negligence of her servant in the business. Judgment having been signed against her for the amount of the damages, she ceased to carry on her business and discharged all her trade debts, but failed to satisfy the judgment debt:—

Held, that the liability under the judgment was a trade obligation, and that, not having discharged it, the debtor was still carrying on business and was liable to bankruptcy proceedings under s. 12 of the Bankruptcy and Deeds of Arrangement Act, 1913.

APPEAL from a decision of the registrar in bankruptcy.

The debtor was a married woman who had carried on the business of a carter. On January 25, 1906, judgment was signed against her for 325*l.* in respect of damages sustained by the judgment creditor in an accident due to the negligence of the debtor's servant in the course of her business. In May, 1906, she ceased to carry on business, having discharged all her trade debts, but leaving the judgment debt still unsatisfied. On September 28, 1914, the registrar dismissed an application by the debtor to set aside a bankruptcy notice against her, founded on an act of bankruptcy committed by her in not paying the judgment debt.

From this order she appealed on the ground that she had ceased to carry on business before the coming into operation of the Bankruptcy and Deeds of Arrangement Act, 1913.

Blanco White, for the appellant. It is admitted that a person must be regarded as continuing to carry on business so long as the debts of that business remain unpaid. In this case the debtor has paid all her trade debts, but she is still under a liability in respect of a tort committed by her servant in the

C. A. 1914

ALLEN, *In re.* SHAW, *Ex parte.*

course of the business. There is a distinction between debts arising out of contract and liabilities arising out of tort. There is no case in which it has been held that a liability of the latter class remaining undischarged constitutes a continuance of the carrying on of a business. [He referred to *In re Dagnall* (1), *In re Worsley* (2), and *In re Clark.* (3)]

Lincoln Reed, for the respondent, was not called upon.

LORD COZENS-HARDY M.R. The point in the present case has been very clearly put by counsel for the appellant, but I think there is really nothing in it. The question is whether the liability for the consequences of an accident due to the negligence of the debtor's servant and involving the payment of heavy damages is or is not an obligation incurred in the carrying on of her business. Now supposing there were a business carried on by a solvent person, and for some purpose or other it was necessary to have a balance-sheet and in the said balance-sheet a sum had to be entered in respect of the payment of damages arising not out of a contract but out of tort, surely those damages would appear in the list of liabilities as a business obligation. I have no doubt that the registrar was quite right in the view which he took that this was an obligation incurred in the course of the conduct of the business of the debtor, and as she has not discharged it she is still to be regarded as carrying on the business and is liable to bankruptcy proceedings under s. 12 of the Bankruptcy and Deeds of Arrangement Act, 1913. In my opinion the appeal fails and must be dismissed with costs.

KENNEDY L.J. I agree that the liability under the judgment is a trade obligation. The case has been very clearly argued, but as I put it to counsel for the appellant, suppose the case of a shipowner whose ship has been in collision with that of another owner and negligently damaged it, would not the liability to pay damages in respect of that negligence be incurred in the course of the first shipowner's business? Although an action to recover them would be an action in tort it would still be impossible

(1) [1896] 2 Q. B. 407. (2) [1901] 1 Q. B. 309.
(3) [1914] 3 K. B. 1095

to say that the liability to pay the damages did not constitute an obligation incurred in the business of the shipowner.

SWINFEN EADY L.J. I am of the same opinion. This is clearly a liability in respect of an obligation incurred while the debtor was carrying on her business. It is a trade obligation caused by the negligence of one of the debtor's servants, a liability which every person employing servants must expect to incur.

Appeal dismissed.

Solicitors: *T. Blanco White; Adler & Perowne.*

G. A. S.

In re A DEBTOR (No. 30 OF 1914). *Ex parte* THE DEBTOR.

1914
Nov. 13.

Bankruptcy — Corporation as Petitioning Creditor — Authority to Officer of Corporation to present Petition — Act of Bankruptcy committed after the Date of Authority — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 148.

A resolution of an incorporated company authorizing one of its officers "to present a petition in bankruptcy on behalf of the company's against a debtor "and to carry on and act in the proceedings subsequent thereto" does not authorize the officer to present a petition founded on an act of bankruptcy committed after the date of the resolution.

APPEAL of debtor against a receiving order made by the county court of Grimsby.

On June 19, 1914, the debtor called a meeting of his creditors, at which a resolution was passed that he should be made a bankrupt. Amongst the creditors were Wilkinson & Houghton, Limited, the respondents to the present appeal. The respondent company by a resolution under their seal, dated July 4, 1914, authorized their secretary "to present a petition in bankruptcy on behalf of the company" against the debtor "and to carry on and act in the proceedings subsequent thereto." The secretary accordingly presented a petition founded upon an alleged notice of suspension of payment as the act of bankruptcy. At the hearing the registrar dismissed the petition upon the ground that

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A DEBTOR, *In re.* THE DEBTOR *Ex parte.*

the notice given by the debtor was insufficient to amount to an act of bankruptcy. On August 1 the company's secretary, purporting to act under the authority of their resolution of July 4, presented another petition, the alleged act of bankruptcy being an execution levied by seizure of the debtor's goods under process in an action in the High Court in which the Wellington Furnishing and Manufacturing Company were plaintiffs, and completed by sale of the said goods on July 7. At the hearing the debtor took the objection amongst others that the secretary had no authority from the company to present the present petition on the company's behalf. The registrar of the county court held that the resolution was sufficient authority and made the receiving order. The debtor appealed.

H. G. Robertson, for the appellant. The resolution of the company, which is in the common form, is an authority to present a petition, not any number of petitions; its office is exhausted with the first petition presented. At all events it must be understood as limited to the presenting of a petition founded upon an act of bankruptcy available at the date of the resolution.

E. H. Cannot, for the respondents. The Bankruptcy Act, 1883, by s. 148 provides that "For all or any of the purposes of this Act a corporation may act by any of its officers authorised in that behalf under the seal of the corporation." That is the section under which a limited company is enabled to present a petition in bankruptcy. There is nothing in the language of it which suggests that a company cannot, in expectation that a debtor will commit an act of bankruptcy, give to one of its officers authority to present a petition as soon as an act of bankruptcy is committed. It may be that at the date of the resolution the directors had a particular act of bankruptcy in their minds, but the resolution ought not to be read as negativing the officer's authority to take further proceedings in the event of the supposed act of bankruptcy turning out to be not available. The debt which was the subject of the second petition was the same debt as that which was the subject of the first. The object of the resolution was to authorize the secretary to recover that debt by

means of bankruptcy proceedings, and whether for that purpose the secretary relied upon one act of bankruptcy or upon another was perfectly immaterial to the directors. The words "act in the proceedings subsequent thereto" are sufficiently comprehensive to include the proceedings on a substituted petition where by reason of an oversight the first one has failed.

HORRIDGE J. This is an appeal from a receiving order. Objection was taken before the registrar that the petition was presented upon behalf of an incorporated company, and that the person who presented it was not "authorised in that behalf under the seal of the corporation" within the meaning of s. 148 of the Bankruptcy Act, 1883. It appears that on July 4 a resolution was passed by the company in question, Messrs. Wilkinson & Houghton, Limited, under their seal whereby they authorized their secretary to present a petition in bankruptcy on their behalf against the debtor. On the same date the secretary presented a petition, the act of bankruptcy relied on being that the debtor had given notice that he was about to suspend payment of his debts. The registrar dismissed the petition on the ground that the notice of suspension was insufficient to constitute an act of bankruptcy. On July 7 the debtor committed a new act of bankruptcy in that execution was on that date levied against him by seizure and sale of his goods. Thereupon the company's secretary presented a fresh petition founded upon that execution. The question is whether he had any authority to present that petition. I think he had not. On July 4, the date of the resolution, the execution which was the foundation of the second petition had not been levied, and I cannot think that the resolution can be construed as authorizing the secretary to present a petition founded upon any act of bankruptcy whether committed before or after the date of the resolution. The authority given by such a resolution must. I think be understood as limited to acts of bankruptcy available at that date. The appeal must be allowed.

ROWLATT J. I am of the same opinion. The question is whether the authority can be construed as authorizing the

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A DEBTOR, *In re.*
THE DEBTOR, *Ex parte.*

presentation of a petition upon an act of bankruptcy which had not yet occurred. It seems to me that it cannot. Where a company give authority to their officer in general terms it ought to be construed as limited to acts of bankruptcy then existing and not as giving the officer a discretion to present a petition upon any act of bankruptcy subsequently committed that he may think proper.

Appeal allowed.

Solicitor for appellant: *J. J. Rutland, for J. Tonge, Grimsby.*
Solicitors for respondents: *Woolfe & Woolfe, for Brown & Son, Grimsby.*

J. F. C.

C. A.
1914
Nov. 14, 18.

[IN THE COURT OF APPEAL.]

GILES *v.* RANDALL.

[1913 G. 517.]

Costs—Taxation—Solicitor and Client Costs—To be paid by Opposite Party—Mode of Taxation—Rules of the Supreme Court, 1883, *Order* LXV., *r.* 27, *sub-r.* 29.

By Order LXV., r. 27, sub-r. 29, of the Rules of the Supreme Court, 1883, "on every taxation the taxing Master shall allow all such costs, charges, and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same no costs shall be allowed which appear to the taxing Master to have been incurred or increased through over-caution, negligence, or mistake, or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses."

An action was settled upon the terms that judgment should be entered for the plaintiff against the defendant for a sum of money "with costs as between solicitor and client to be taxed (if necessary)." The judgment was accordingly drawn up to that effect. The taxing Master taxed the costs upon the footing that the second part of sub-r. 29 applied, and he disallowed or reduced in amount a large number of items, stating in effect that a taxation of costs as between solicitor and client, where the costs were to be paid by one party to another party, was stricter than a taxation as between solicitor and client where the costs were to be paid by the client to his solicitor and gave little more than a taxation as between party and party:—

Held, that the second part of sub-r. 29, from the words "but save as

against the party who incurred the same," applied to all taxations except a taxation as between a solicitor and his own client, and that, having regard to the above distinction in taxations as between solicitor and client, the taxing Master had taxed the costs on the proper principle.

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APPEAL from an order of Scrutton J. at chambers refusing to direct a review of taxation.

The plaintiff brought an action against the defendant to recover damages for breach of promise of marriage. When the case was in the day's list for hearing terms were agreed and indorsed on counsel's briefs "that judgment should be entered for the plaintiff for 500*l.* with costs as between solicitor and client to be taxed (if necessary)," and accordingly the judgment as drawn up stated that "it is adjudged that the plaintiff recover against the defendant 500*l.* and her costs as between solicitor and client to be taxed (if necessary)." The plaintiff's bill of costs was accordingly taxed, and the taxing Master disallowed or reduced in amount a large number of items therein, such as the charges for instructions for briefs and counsel's fees. The plaintiff carried in objections to the disallowances before the taxing Master, which, so far as material, were as follows: "The plaintiff objects generally to the taxation and to the disallowance of the items hereinafter mentioned on the grounds: (1.) Such taxation was conducted upon the basis of a party and party taxation. (2.) It ought to have been conducted upon the basis of a taxation as between solicitor and client where the costs are to be paid by the client, because the terms of settlement of the action were that the plaintiff was to receive 500*l.* damages clear, and all the costs for which she was liable to her solicitor were to be paid by the defendant." The taxing Master in his answer thereto (so far as material) said: "It is well settled that there are various forms of taxation as between solicitor and client. No. 1. Where the costs are payable by the client to his solicitor or where the costs are payable out of a fund belonging entirely to the party. No. 2. Where the costs are payable out of a general or common fund. No. 3. Where the costs are payable out of a fund which belongs to other parties and in which the party has no interest or where the costs are payable by one party to another.

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"The taxation in the case of No. 3, which is the one that applies to this action, is the strictest and in effect gives little more than a taxation as between party and party, except that any necessary letters to and attendances on the client are allowed.

"The opinion was expressed in *Ryan* v. *Dolan* (1) that as to solicitor and client costs payable by another party the rules are 'liability to the solicitor and fair justice to the opposite party'; but this must now be read with Order LXV., r. 27, which applies to all taxations [see *In re Harrison* (2)]. Regulation 29 of that Order precludes the allowance save as against the party who incurred them of costs which appear to the taxing Master to have been incurred or increased through over-caution, negligence, or mistake, or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses. I have taxed accordingly.

"Subject to the above the objections do not involve any question of principle. They relate only to matters of quantum and detail.

"The allowances and disallowances were made after very much consideration of all the circumstances of the case and after hearing the arguments of counsel on the objections. I have carefully reconsidered my allowances and made further allowances in some instances, and I am of opinion that I have taxed the costs on the proper principle, and made all proper and necessary allowances."

Scrutton J. refused to order a review of taxation. The plaintiff appealed.

R. J. Sutcliffe, for the plaintiff. There are three classes of taxation of costs as between solicitor and client, which are stated in the taxing Master's answer to the objections, and which are enumerated in Daniell's Chancery Practice, 8th ed., p. 1078, so far as costs to be paid out of a fund are concerned. The distinction between these three classes of taxation is well established and is not now questioned. In the first place, the judgment as drawn up intends the plaintiff to have a taxation as between solicitor

(1) (1872) Ir. R. 7 Eq. 92, at p. 94. (2) (1886) 33 Ch. D. 52

and his own client, regard being had to the fact that another person is to pay them. The words "if necessary" are very unusual words and show the intention that the plaintiff shall be indemnified against costs unless they are exorbitant, in which case they may be taxed.

Assuming that the contention upon this point is wrong, the taxing Master has taxed the costs on a wrong principle. The taxing Master has misdirected himself in taxing the costs. He says in his answer to the objections that the third form of taxation as between solicitor and client, which applies to the present taxation, gives little more than a taxation as between party and party, "except that any necessary letters to and attendances on the client are allowed." Such letters and attendances as are there mentioned would be allowed on taxation as between party and party on the principle laid down by Malins V.-C. in *Smith* v. *Buller*. (1) Further, the taxing Master seems to have taxed the costs upon the basis that the second part of Order LXV., r. 27, sub-r. 29, applies to solicitor and client taxation.

[BUCKLEY L.J. We have seen the taxing Master, and he tells us that he taxed the bill upon the footing that the latter part of sub-r. 29 applied to this taxation.]

The taxing Master was wrong in that, and therefore taxed the bill upon a wrong basis. The case of *In re Harrison* (2), referred to by the taxing Master in support of his view, was decided in 1886 upon sub-r. 48 and not upon sub-r. 29. In January, 1902, sub-r. 29 was altered. Before that date the old sub-r. 29 applied only to taxations as between party and party. This is so stated in the Annual Practice, 1901, p. 962. The first part of the new sub-rule applies to all taxations, and it gives greater discretion to the taxing Master than the former rule gave. The second part of the sub-rule beginning with the words "But save as against" applies only to party and party taxation, and not to taxation as between solicitor and client. This is so stated by Buckley J. in *Cavendish* v. *Strutt* (3): "The second part applies only to taxation as between party and party, for by the words 'save as against the party who incurred the same,' it excepts a taxation as between

(1) (1875) L. R. 19 Eq. 473, at p. 475 (2) 33 Ch. D. 52.
(3) [1904] 1 Ch. 524, at p. 530.

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solicitor and client." The result of giving effect to the defendant's contention is to restrict the discretion of the taxing Master in taxing costs as between solicitor and client, whereas the sub-rule purports to enlarge the taxing Master's discretion in every taxation of costs. Solicitor and client costs ought to give something in the nature of an indemnity, as, for instance, under s. 1 (*b*) of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61). [*Ryan* v. *Dolan* (1) and *In re Ermen* (2) were also referred to.]

W. Whately, for the defendant. Order LXV., r. 27, sub-r. 29, applies to all taxations, including the three classes of taxation of costs as between solicitor and client, except the last part, which, in consequence of the words "but save as against the party who incurred the same," does not apply to a taxation as between solicitor and his own client. It applies to all other taxations, including the taxation in this action. In *Cavendish* v. *Strutt* (3) Buckley J. was dealing with a taxation of costs as between party and party, and when he said that the second part of the sub-rule applied only to taxation as between party and party for the saving words excepted a taxation as between solicitor and client, he was not then discussing any distinction between the various classes of taxation as between solicitor and client. By "solicitor and client" he clearly intended to refer to a taxation between a solicitor and his own client.

R. J. Sutcliffe in reply.

BUCKLEY L.J. Before this action came to trial terms were settled. If we had any right to inquire into the matter it would probably be found that it was intended that the plaintiff should receive 500*l.* and not be out of pocket in respect of costs. That, however, is not the question we have to consider. The terms are in the judgment as drawn up, and the only question is what is the proper taxation of costs under that judgment. That judgment is "that the plaintiff recover against the defendant 500*l.* and her costs as between solicitor and client to be taxed (if necessary)." The words "if necessary" merely mean that if the parties can agree there shall be no taxation; if they cannot agree,

(1) Ir. R. 7 Eq. 92. (2) [1903] 2 Ch. 156, at p. 164.
(3) [1904] 1 Ch. 524, at p. 530.

there is to be a taxation. Those words throw no light upon the question upon what principle the costs are to be taxed as between solicitor and client.

There are three modes of taxation as between solicitor and client. The first is where a client is taxing his own solicitor's bill of costs, commonly called taxation as between solicitor and own client. The second is where the costs are to be paid out of a common fund in which the client and others are interested. This case does not come within either of those two classes. The third is where the costs are payable by one party to another or out of a fund in which the party entitled to the costs has no interest. The present case falls within this last mentioned class. The plaintiff was to have her costs as between solicitor and client to be paid by the defendant. A practice has grown up, which I must say I regret, of differentiating between taxation of costs as between solicitor and client and as between solicitor and own client. In the former case the taxation is substantially a party and party taxation on a more generous scale. In the latter case there is an ascertainment and allowance of the charges properly payable by the client to his solicitor. That distinction is too firmly established for this Court to interfere with it, though it may be a matter proper to be considered by the Rule Committee. I have no doubt that litigants who stipulate for and by agreement are to receive costs as between solicitor and client often intend to get an indemnity in respect of costs.

The taxing Master has taxed the costs upon the footing that the latter part of r. 27, sub-r. 29, of Order LXV. applies. The history of that sub-rule is this. As the sub-rule stood before the alteration in 1902 it was negative in form and was confined to costs as between party and party. It ran thus: "As to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper for the attainment of justice or defending the rights of the party, or which appear to the taxing officer to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party." In January, 1902, this sub-rule was so altered as that the first part was reproduced in an affirmative

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instead of a negative form and was made to extend to every taxation. It now runs thus: "On every taxation the taxing Master shall allow all such costs, charges, and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party." So far the new sub-rule was silent as to the costs dealt with in the latter part of the old sub-rule, namely, costs incurred through over-caution, &c. Those costs are remitted to the latter part of the new sub-rule, which runs thus: "But save as against the party who incurred the same no costs shall be allowed which appear to the taxing Master to have been incurred or increased through over-caution, negligence, or mistake, or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses." Here I find picked up and reproduced in negative words the latter part of the old sub-rule. The meaning is this. The earlier part of the new sub-rule says that the taxing Master shall allow a certain class of costs. The latter part says that, except in one particular case, certain costs which were formerly to be disallowed are still to be disallowed. The excepted case is that of taxation of costs as between a solicitor and his own client. This part of the sub-rule in effect provides that as between solicitor and own client those costs may be allowed, but that in all other cases they shall not. The other cases include taxation as between solicitor and client as distinguished from taxation as between solicitor and own client. Accordingly upon such a taxation as this the costs described in the latter part of sub-r. 29 are not to be allowed. The taxing Master in this case has proceeded upon that footing. He says that "the taxation in the case of No. 3, which is the one that applies to this action, is the strictest and in effect gives little more than a taxation as between party and party, except that any necessary letters to and attendances on the client are allowed." That is not very well expressed. "Necessary letters to and attendances on the client" are allowed as between party and party; the letters and attendances there referred to must be letters and attendances beyond those that would be allowed as between party and party. The taxing Master has taxed this bill of costs on the footing that the latter part of sub-r. 29 applies.

For the reasons I have given I think that he was right. Except upon a taxation as between solicitor and own client such costs as there mentioned are not to be allowed. That is the only question of principle argued before us. This Court does not interfere on questions of quantum.

The appeal must be dismissed.

PICKFORD L.J. I am of the same opinion. The action was settled on the terms that judgment should be entered for the plaintiff for 500*l.* with costs as between solicitor and client to be taxed (if necessary). I agree that the words "if necessary" are not of any materiality here. The taxing Master has taxed off the bill a large amount, and from one point of view I regret that I feel bound to affirm his decision, because I do not think that the plaintiff has got what she supposed she was getting when these terms were agreed upon. She accepted the terms of settlement because she thought that she would get all that she would have to pay to her solicitor. She does not get that under the practice as to taxation as it now stands. Logically costs as between solicitor and client can only mean one thing, namely, such costs as are properly chargeable between a solicitor and his client and as are properly payable by the client to his solicitor. It seems to me that it is irrelevant to inquire from what source the payment is to come or by whom the payment is to be made; the costs ought to be measured in the same way whether the client has made a bargain that he shall receive those costs from some one else or not. But a different rule of practice prevails, and the taxing Master must according to that practice look in each case to the source from which the payment is to come. In Daniell's Chancery Practice, 8th ed., p. 1078, it is said, dealing with taxation of costs as between solicitor and client, that "a distinction is made: first, where such costs are payable out of a fund belonging to other parties; secondly, where such costs are payable out of a common fund in which the party entitled to costs has only a limited interest; and thirdly, where such costs are payable out of a fund belonging exclusively to such party himself. These distinctions however are not made in the order directing the taxation, but only when the order is acted upon by the taxing

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officer; and if it is intended that the party whose costs are to be paid out of a general fund should be fully indemnified against all expenses, or against any expenses not strictly costs of action, care must be taken to have it so expressed in the ordinary order; as the direction that the costs are to be taxed as between solicitor and client will not, in such a case, be sufficient." The distinction has been in existence for a long time, and we cannot now disregard it. It is frequently provided against by inserting words in the order giving an indemnity against all costs, or stating that there shall be no taxation of certain items, such as counsel's fees. Under that practice the taxation in this case is not really a taxation as between solicitor and client at all, but is a taxation as against the person who has to pay the costs. The question is what costs are properly chargeable as against him under an order for taxation as between solicitor and client. Is the taxing Master right in saying that the second part of Order LXV., r. 27, sub-r. 29, applies to this taxation? The first part of the sub-rule applies to all taxations. *Cavendish* v. *Strutt* (1) is relied upon as an authority for saying that the second part of sub-r. 29 only applies to taxation as between party and party. In that case Buckley J. said (at p. 530) that "the second part applies only to taxation as between party and party, for by the words, 'save as against the party who incurred the same,' it excepts a taxation as between solicitor and client." But it is clear what that passage means. The learned judge had in mind a taxation as between solicitor and his own client who had to pay, and he was contrasting that with a taxation as between party and party. He was not considering the different forms of taxation as between solicitor and client. His reference to the words "save as against the party who incurred the same" shows that. According to the practice of taxation which has grown up upon, so far as I can see, no intelligible principle, this taxation is really not a taxation of costs properly chargeable by a solicitor to his client, but a taxation as against the person who has to pay the costs. As soon as one arrives at that conclusion it follows that the case comes within the second part of sub-r. 29, because the taxation here is not a taxation as between a solicitor and his own client, which

(1) [1904] 1 Ch. 524.

is the only case excepted out of the second part of the sub-rule. If there had not been this practice I should have decided otherwise. But the practice applies, and this taxation is really a taxation as against a party who has agreed to pay the costs.

Appeal dismissed.

Solicitors for plaintiff: *Hughes, Bartlett & Thornton.*
Solicitors for defendant: *Stanley Evans & Co.*

W. F. B.

THE KING *v.* RICHARDS.
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Nov. 13.

Parliament—Election—Returning Officer—Municipal Borough a County of itself—Parliamentary Borough with two Mayors—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 244, *sub-ss.* 1, 2—*Redistribution of Seats Act*, 1885 (48 & 49 *Vict. c.* 23), *s.* 12, *sub-s.* 4.

The provision in s. 244, sub-s. 2, of the Municipal Corporations Act, 1882, that "If there are more mayors than one within the boundaries of a parliamentary borough the mayor of that borough to which the writ of election is directed shall be the returning officer" has no application to the case of a borough which is a county of itself. In such a borough the sheriff of the county of the city or town (as the case may be) continues as theretofore to be the returning officer.

RULES to the revising barristers of the boroughs of Llanelly and Carmarthen to hand the lists of parliamentary voters in their respective boroughs to the town clerk of Llanelly.

The borough of Carmarthen is an ancient municipal borough. By a charter of James I. it was created a county of itself, and by a later charter of 1764 in the reign of George III. that grant of the status of a county of itself was confirmed to it. By the said charters the borough was authorized to elect annually two sheriffs. By s. 61 of the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), the council of the county of the town of Carmarthen were to appoint annually one sheriff who was to perform all the duties theretofore performed by the two.

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Carmarthen had also from very early times been a parliamentary borough, and down to 1832 had by itself returned a member to Parliament. By the Representation of the People Act, 1832 (2 Will. 4, c. 45), s. 8 and Sched. E, it was provided that Llanelly should "have a share in the election of a member to serve in all future Parliaments for the shire town or borough" of Carmarthen. Since that date the writ for the election of such member continued as theretofore to be directed to the sheriff of the county of the town of Carmarthen. (1) On August 14, 1913, Llanelly was incorporated as a municipal borough, since which date there have been two mayors within the boundaries of the parliamentary borough of Carmarthen. According to the last census, which was taken in 1911, the population of the borough of Carmarthen was 11,944 persons, and that of Llanelly was 32,701.

On September 15, 1914, L. M. Richards, the revising barrister for the borough of Llanelly, revised the lists of parliamentary voters for the said borough, and on September 16 St. J. F. Williams, the revising barrister for the borough of Carmarthen, revised the lists of parliamentary voters for the said borough of Carmarthen. The town clerk of Llanelly applied to the said revising barristers to hand to him the revised lists of voters for the said boroughs, claiming that he was entitled to receive them, upon the ground that, the population of Llanelly being larger than that of Carmarthen, the mayor of Llanelly was under the provisions of s. 12, sub-s. 4, of the Redistribution

(1) In the course of the argument there was some discussion as to whether the terms of the said charters authorized the direction of writs for the election of members to Parliament to the sheriffs of the borough of Carmarthen. But it appears from Dalton's Office of Sheriff that the right and duty of the sheriff of a county of a town to receive and return writs for parliamentary elections is derived not from the terms of the charter of incorporation of the borough under which he is appointed, but from the common law. In a note appended to the "Form of the Writ" at p. 338 of the 1700 edition it is said, "Where the aforesaid writ for summoning of the Parliament hath in it these words *De qualibet civitate comitatus illius duos cives*, that is to be intended where the city is no county in itself. For if it be a county of itself (as London, Norwich, and such,) then the writ shall be directed to them as it shall be to the sheriffs of other counties." The words "to them" must refer to the sheriffs of the county of the city or town.—Reporter.

of Seats Act, 1885 (1), the person to whom the writ of election was to be directed. The revising barristers having refused to hand to him the said lists of voters, these rules were obtained.

Macmorran, K.C., and *G. W. Bailey*, for the town clerk of Carmarthen, and *E. G. Palmer*, for the sheriff of Carmarthen, showed cause. Before 1832 the sheriff of Carmarthen was from the time when the borough became a county the returning officer at parliamentary elections, and the provision in the Representation of the People Act of that year that Llanelly should share with Carmarthen in the election of a member made no difference in this respect, for although the electoral area was increased the member elected was still to be a member "for the shire town of Carmarthen": s. 8 and Sched. E. Nor is there any provision in any later Act which takes away that right of the sheriff. By s. 57 of the Municipal Corporations Act, 1835, it was provided that "The mayor for the time being . . . . in boroughs which return a member or members to serve in Parliament . . . . other than cities and towns which are counties of themselves shall be the returning officer at all such elections; . . . . Provided always that in every case where there shall be more than one mayor within the boundaries of any borough . . . . the mayor of that borough to which the writ of election shall be directed shall be the returning officer." It is obvious that that proviso does not affect the right of the sheriff, for it

(1) By the Redistribution of Seats Act, 1885, s. 12, sub-s. 4, "Whereas by the Municipal Corporations Act, 1882, it is enacted that if there are more mayors than one within the boundaries of a parliamentary borough, the mayor of that municipal borough to which the writ of election is directed shall be the returning officer; Be it therefore enacted that, In any such case the writ of election shall be directed to the mayor of that one of the municipal boroughs to the mayor of which the writ has before the passing of this Act been directed, or if it has not been directed to any such mayor, then to the mayor of that one of the municipal boroughs which has the largest population according to the last census for the time being, and in any such case the town clerk of the municipal borough the mayor of which is the returning officer shall be the town clerk who, under the Registration Acts, is to receive the revised lists of parliamentary voters from the revising barrister."

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has no application to a borough which is a county of itself, but only applies to a borough in which the writ of election might lawfully be directed to the mayor. By the Municipal Corporations Act, 1882, which was a consolidation Act, the Act of 1835 was repealed, its principal provisions being re-enacted. By s. 170 the council of every borough being a county of itself was annually to appoint a sheriff, who was to have the same duties and powers as before. By s. 244 the provisions of s. 57 of the earlier Act were reproduced in slightly different language. (1) The fact that sub-s. 2 is not headed, as in the corresponding portion of s. 57 of the earlier Act, by the words "Provided always" does not make it any the less a proviso upon sub-s. 1, or any the less require its being read as applying only to boroughs which are not counties of themselves. Moreover, by s. 250 there is a general saving of the rights, powers, and privileges vested in any municipal corporation existing at the commencement of the Act or its officers, which is sufficient to preserve the right of the sheriff as returning officer. Then s. 12, sub-s. 4, of the Redistribution of Seats Act, 1885, after reciting the provisions of s. 244, sub-s. 2, of the Act of 1882, provides that in a case where there are two mayors in a parliamentary borough, if before that Act the writ of election was not directed to one of such mayors, it is in future to be directed to the mayor of the borough which has the largest population. At that date the writ was directed not to the mayor but to the sheriff, and that state of things continued down to 1913, when Llanelly was created a municipal borough. It is said that thereupon s. 12, sub-s. 4, came into operation, and that the mayor of Llanelly, as being the borough with the larger population, became thenceforward the returning officer, and that the lists of voters were deliverable by the revising barrister to the town clerk of Llanelly. But s. 12, sub-s. 4, has no application to the

(1) By the Municipal Corporations Act, 1882, s. 244, sub-s. 1, "In boroughs, other than cities and towns being counties of themselves, the mayor shall be the returning officer at parliamentary elections."

Sub-s. 2: "If there are more mayors than one within the boundaries of a parliamentary borough, the mayor of that borough to which the writ of election is directed shall be the returning officer."

case of Carmarthen, for it is only supplemental to s. 244, sub-s. 2, of the Act of 1882, and the words "in any such case" show clearly that it is dealing only with the same subject-matter, that is to say, boroughs which are not counties of themselves. Then s. 48 of the Parliamentary Registration Act, 1843 (6 & 7 Vict. c. 18), contemplates the lists of voters being handed by the revising barrister to "the town clerk of the same city or borough" as that represented by the returning officer, here Carmarthen.

R. M. Montgomery, K.C. (*Foote, K.C.*, with him), for the town clerk of Llanelly. This is precisely the case to which the words of s. 12, sub-s. 4, of the Act of 1885, "if it has not been directed to any such mayor," were intended to apply. The contention that that sub-section does not apply to a parliamentary borough made up of two municipal boroughs, one of which is a county of itself, proceeds upon the assumption that s. 244, sub-s. 2, of the Act of 1882 did not apply to parliamentary boroughs of that class, for admittedly the later section is only supplemental to the earlier. But that assumption is unfounded. The two sub-sections of s. 244 refer to different subjects. Sub-s. 1 deals with "boroughs," and by s. 7 of that Act "'Borough' means . . . . a city or town to which this Act applies," that is to say a municipal borough, whereas sub-s. 2 deals with a "parliamentary borough," which term is defined by s. 7 to include a combination of places returning a member to serve in Parliament, and not being a county at large or a riding, parts, or division of a county at large." Carmarthen with Llanelly is such a combination of places and is consequently a parliamentary borough, and it is none the less a parliamentary borough because one of the two constituent places is a county of a town, for the only limitation in the definition of "parliamentary borough" is that it must not be a county at large or part of a county at large. It is not permissible to read the exception of "towns being counties of themselves" in sub-s. 1 of s. 244 into sub-s. 2 of that section. But even if it were so read in it would not affect this case, for the parliamentary borough here is the combination of Carmarthen and Llanelly, which combination is not a "town being a county of itself." In order to reach the construction

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contended for by the other side it would be necessary to read sub-s. 2 as if the words were "If there are more mayors than one, within the boundaries of a parliamentary borough any part of which is a town being a county of itself," and that is an alteration of the language which cannot be justified. Sect. 250 of that Act does not preserve the rights of the sheriff, for the saving of the rights of existing corporations and their officers is declared to be "without prejudice . . . . to the . . . . express provisions of this Act."

DARLING J. These are two rules calling upon the revising barristers of the boroughs of Llanelly and Carmarthen to show cause why they should not be ordered to deliver the lists of the parliamentary voters in their respective boroughs to the town clerk of Llanelly. If it is right that they should so deliver those lists to the town clerk of Llanelly it must be because the mayor of Llanelly is the returning officer for the parliamentary borough of Carmarthen, so the question in dispute is whether that mayor is the returning officer.

We have not been told when Carmarthen first began to return members to Parliament, but it had done so for many years before 1832, and it continued to do so after Llanelly in that year had been given the right to participate in the return of a member for the borough of Carmarthen. The borough of Carmarthen, as appears from the recitals in the charter of 1764, is a municipal borough of great antiquity. It was by the said charter provided that it "shall be and remain a county of itself and shall be called the county of the borough of Carmarthen for ever." It also provided that the borough should annually elect two sheriffs. From that date it is certain that whenever a writ of the King was sent to Carmarthen ordering the borough to return a burgess to Parliament the writ was directed to the sheriffs, or since 1835 to the sheriff, the Municipal Corporations Act of that year having provided that thenceforward one sheriff should perform the duties theretofore performed in that borough by two. Then came the Municipal Corporations Act, 1882, upon the construction of which the present dispute has largely turned. By s. 244, sub-s. 1,

of that Act, "In boroughs, other than cities and towns being counties of themselves, the mayor shall be the returning officer at parliamentary elections." And by sub-s. 2, "If there are more mayors than one within the boundaries of a parliamentary borough the mayor of that borough to which the writ of election is directed shall be the returning officer." It is clear that upon the passing of that Act that sub-section, sub-s. 2, did not apply to Carmarthen, and for two reasons; in the first place there were not at that date two mayors within the parliamentary borough, and secondly if there had been, sub-s. 2 must be read along with sub-s. 1, which is confined to boroughs other than boroughs which are counties of themselves; and the borough of Carmarthen was a county of itself. Moreover in s. 250 there is an express saving of the rights, powers, and privileges of corporations existing at the commencement of the Act and of their officers. Then came the Redistribution of Seats Act, 1885, s. 12, sub-s. 1, of which, after reciting the provisions of s. 244, sub-s. 2, of the Act of 1882, provided that "In any such case the writ of election shall be directed to the mayor of that one of the municipal boroughs to the mayor of which the writ has before the passing of this Act been directed, or if it has not been directed to any such mayor, then to the mayor of that one of the municipal boroughs which has the largest population according to the last census for the time being." I think that that section does not apply to Carmarthen at all, for it is only an amendment of s. 244 of the Act of 1882 and only applies to the boroughs to which that section applied, and of those boroughs, as I have already said, Carmarthen, being a county of itself, was not one. Therefore, I am of opinion that, notwithstanding the fact of the recent incorporation of Llanelly, and the fact that there are consequently now more mayors than one within the parliamentary borough of Carmarthen, the sheriff of Carmarthen continues as before to be the returning officer. It is to me inconceivable that it should have been intended by the mere grant of a charter of incorporation to Llanelly, in which charter Carmarthen was not mentioned, to take away any of the ancient privileges of that borough. I think the rules should be discharged.

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LAWRENCE J. I am of the same opinion. The incorporation of Llanelly does not seem to me to necessarily involve the transference to the mayor of that borough of the powers, rights, and duties which have hitherto existed in the sheriff of Carmarthen. I do not see any difficulty in reading s. 244 of the Municipal Corporations Act, 1882, as excepting boroughs which are counties of themselves from the operation of sub-s. 2 just as much as from that of sub-s. 1. I cannot think that it was intended by sub-s. 2 to interfere with the privileges of boroughs which were counties of themselves; indeed it is clear from s. 250, which is a very ample saving clause, that it was not so intended. Nor do I think that there is any such intention to be found in the Redistribution of Seats Act, 1885. It may very well be that the measure of population was the best test by which the question as to which of two mayors was to be returning officer should be decided in cases where the boroughs were otherwise on an equal footing, but here what is proposed is an interference with the ancient rights of an ancient borough which I think would have been specially dealt with if it had been so intended.

SANKEY J. I agree. I desire to put my judgment upon three grounds. First I think that s. 244 of the Municipal Corporations Act, 1882, must be read as a whole, and so read it does not apply to the case of Carmarthen. It specially states in sub-s. 1 that it applies to "boroughs other than cities or towns being counties of themselves." I am confirmed in that view by the fact that s. 244 is only a re-enactment, in practically similar language, of s. 57 of the Municipal Corporations Act, 1835. It follows as a matter of course that if s. 244 does not apply to the case of Carmarthen, which is a county of a town, neither does s. 12, sub-s. 1, of the Redistribution of Seats Act, 1885, apply to it. My second ground is that this is an attempt to take away the rights and privileges of an ancient officer, and we ought not to countenance such an attempt unless the words which are relied on for that purpose are clear beyond all doubt. In my opinion the words which are supposed to take away those rights and privileges are far from clear. My third ground is that so far

from the words which it is suggested take away those rights and privileges being clear, those rights and privileges are actually saved by s. 250 of the very Act which is supposed to take them away.

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Rules discharged.

Solicitors for the Corporation of Carmarthen: *Baker & Sons.*

Solicitors for the Corporation of Llanelly: *Rhys Roberts & Co., for W. Spowart, Llanelly.*

Solicitors for the sheriff of Carmarthen: *Baker & Sons.*

J. F. C.

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Nov. 16.

Shipping — Charterparty — Effect of Sale of Ship while Charterparty still executory.

By a berth contract made between shipowners and charterers the former agreed that their ship, the *Rosalia*, should proceed as ordered to Odessa and there load a complete cargo to be delivered at another port. Before the *Rosalia* proceeded to Odessa the shipowners sold her to a company with the benefit of the berth contract, and the purchasers declared that they accepted the execution of that contract. Notice of the sale was given to the charterers. The *Rosalia* was tendered at Odessa to the charterers, but they refused to load her, contending that by the sale of the ship the shipowners had put it out of their power to perform the contract. In a claim by the original owners:—

Held, that the sale of the ship did not preclude the original owners from performing, through the purchasers, the obligations of the contract; that the charterers were not entitled to refuse to load the ship, and were therefore liable in damages for so refusing.

AWARD in the form of a special case.

By a berth contract dated September 15, 1913, and made between Fratelli Sorrentino (therein described as the owners of the steamship *Rosalia* and hereinafter referred to as the claimants) and Elias Buerger and S. Teper (thereinafter and hereinafter described as the charterers), it was agreed that the *Rosalia* should proceed as ordered to Odessa or certain other ports and there load as ordered a full and complete cargo of wheat and/or grain and/or seed for Rotterdam, Weser, or

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Hamburg as ordered on signing bills of lading. Freight was to be paid at the rate mentioned in the berth contract.

By the contract it was further provided that orders for the loading port were to be given at Constantinople within a certain time, and if orders were not given by the charterers within that time the steamer was to proceed to Odessa Roads for orders, which were to be given within six running hours of arrival, Sundays only excepted. The contract also contained an exception clause, but it provided that, unless the vessel was stranded, sunk, or burnt, nothing in the clause was to exempt the shipowners from liability to pay for damage to cargo occasioned by bad stowage. Latent defects in the hull and/or machinery were not to be considered unseaworthiness provided the same did not result from want of due diligence of the owners. The owners were to pay the tonnage, health, and pier dues, pilotage, and certain other charges. Cash to a specified amount was to be advanced at port of loading to the captain if required by him, such advance to be indorsed by him on the bill of lading and to be deducted from freight at port of discharge, or to be repaid by the captain's draft on his owners. The penalty for non-fulfilment of the contract was to be the proved damages, but not exceeding the estimated amount of freight. Any dispute arising under the contract was to be referred to arbitration.

On September 25, 1913, whilst the *Rosalia* was discharging at Venice, the claimants entered into a contract for the sale of the vessel to the Società Anonima di Navigazione Adriatica (hereinafter called "the Adriatica"), an Italian company domiciled in Venice. That contract contained the following clauses:—"The sellers declare that the steamer is chartered from the Black Sea to Rotterdam at 12*s.* per unit, 12*s.* 3*d.* for Weser, 12*s.* 6*d.* for Hamburg . . . . as per berth contract, which will be handed over in a few days." "The buyers declare that they accept fully the execution of the charterparty for the Black Sea voyage to one of the ports as ordered on signing B/L for their entire risk and advantage, undertaking every obligation relating thereto."

On October 4, 1913, the *Rosalia* was taken over by the Adriatica after she had discharged her cargo at Venice.

On October 11 the vessel sailed for Constantinople with a view

to fulfilling the berth contract, and her departure was duly notified to the charterers.

On October 11 the London brokers, acting for the claimants, wrote to the charterers' London representatives, informing them of the sale of the *Rosalia* to the Adriatica and that the latter would carry out the terms of the berth contract.

On October 13 the charterers' representatives replied that, as the claimants had made no effort to perform their contract and had put it out of their power so to do, the charterers did not propose to enter into fresh arrangements for the vessel, and on October 15 they again wrote that they considered the contract at an end.

Both Fratelli Sorrentino and the Adriatica protested against the charterers' statements and insisted that the contract should be fulfilled.

On October 19 the vessel arrived at Constantinople, and then she proceeded to Odessa and applied to the charterers' agents there for orders, but as no orders were received the captain made a formal protest and informed the Adriatica, who then chartered the vessel for other employment.

The umpire found as a fact that the vessel was duly tendered under the berth contract and that the claimants and the Adriatica were always ready and willing to do all things necessary on their part towards the fulfilment of the contract, and the vessel was not loaded solely by reason of the charterers' refusal to load her.

Subject to the opinion of the Court on any question of law, the umpire found that the charterers were guilty of a breach of the berth contract in refusing to load, and he found that the damages which arose from that breach amounted to 1012*l.* 14*s.* 3*d.*

So far as it might be material, the umpire found as a fact that, apart from any question of responsibility under the sale contract to the Adriatica, the claimants had not suffered any pecuniary loss by reason of the breach of contract, the loss having up to the present fallen upon the Adriatica, for whose benefit and with whose sanction and approval the arbitration proceedings were brought by the claimants.

The charterers raised as questions of law on which they desired the opinion of the Court to be taken: (*a*) that by the sale of the

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steamship the claimants put it out of their power to, and were not able to, perform the contract; (*b*) that by reason of the alleged assignment by the claimants to the Adriatica of the berth contract the claimants' rights under the berth contract, if any, ceased.

Subject to the opinion of the Court upon the questions of law, the umpire awarded that the claimants should recover from the charterers the said sum of 1012*l.* 14*s.* 3*d.* subject to the claimants producing to the charterers an order by the Adriatica to pay the amount of the said award to the claimants or their agents, or a discharge by the Adriatica for the amount.

R. A. Wright, for the claimants. If a contract is not of a purely personal nature and requires no special skill in its performance, the contractor may perform it by deputy, although no doubt he remains liable to the other party for any breach of the contract. Suppose a vessel owned by a limited company is chartered and a receiver and manager is then appointed on behalf of debenture-holders, can it be said that thereby the contract is brought to an end because it would have to be performed by the receiver and manager? Or again, if a shipowner dies, can it be contended that a charterparty entered into by him is terminated by the fact that it would have to be performed by his representatives? There is no warranty that a person named as owner in a berth contract, which is the same thing as a charterparty, will remain owner till the completion of the contract, or that he will perform it personally. There has been no decision expressly dealing with charterparties, but the law on the subject generally was dealt with in *British Waggon Co.* v. *Lea* (1) and in *Tolhurst* v. *Associated Portland Cement Manufacturers.* (2) In the former of these cases a waggon company let to the defendants a number of railway waggons for a term of years at an annual rent, the agreement providing that the waggon company should during the term keep the waggons in repair. The benefit of that contract was assigned by the waggon company to another company upon the terms that the latter company should perform the stipulations by the assignors contained in the original contract. The assignees were always ready

(1) (1880) 5 Q. B. D. 149. (2) [1902] 2 K. B. 660; [1903] A. C. 414.

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and willing to execute all necessary repairs to the waggons, but the defendants contended that the contract was at an end as the original company, as between themselves and the defendants, had no right to substitute a third party to do the work they had engaged to perform. That defence was held untenable. It was decided that the general principle that contracts have to be performed by the promisor was inapplicable to those circumstances as it could not be supposed that in stipulating for the repair of the waggons the defendants attached any importance to whether the repairs were done by the company or by any one with whom they might enter into a subsidiary contract for that purpose. That case was approved in *Tolhurst's Case.* (1) There the contract was for the supply of chalk for fifty years at a certain price to a company, and it was held that no question of any personal confidence or skill was involved, and that another company to whom the contract had been assigned by the first company were entitled to enforce it.

[ATKIN J. I suppose it will be said by the respondents that a contract by charterparty is one that cannot be performed vicariously.]

The charterparty has only to be looked at to see that it has not to be performed personally by the owner.

F. D. MacKinnon, K.C. (*A. Roche, K.C.*, with him), for the charterers. *British Waggon Co.* v. *Lea* (2) and *Tolhurst's Case* (1) are merely illustrations of contracts in which a term may be implied whereby the original party contracts that either he or any one whom he may substitute will perform the work. *Kemp* v. *Baerselman* (3) is an illustration of a business contract where the Court refused to imply such a term. Prima facie if a person promises to do a certain thing he promises to do it himself: Anson on Contracts, 13th ed., pp. 272, 273. In *Dimech* v. *Corlett* (4) it was said that it is "not easily reconcileable to reason or justice, that one party to a mercantile contract should have the power, without the privity or consent of the other, to substitute a third person for himself and in his place,

(1) [1902] 2 K. B. 660; [1903] A. C. 414.
(2) 5 Q. B. D. 149.
(3) [1906] 2 K. B. 604.
(4) (1858) 12 Moo. P. C. 199, at p. 223.

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simply on condition of being responsible for the solvency of that third person. The circumstances and the qualifications of the parties between whom a contract is made, are always material, in a greater or less degree. A change of the party on one side, even with this guarantee, alters the condition of the other party, affects the nature of his remedy, and makes the contract a new one. Some well-known exceptions in the general mercantile law have been recognized, as in the case of negotiable or transferable instruments; but we are not aware that charterparties have ever been included among these." In a contract of this nature the personal character and financial standing of the shipowner are matters of great importance. There may be, as there are in this contract, serious liabilities on the owner in the event of loss through bad stowage, and in reference to cash advances, &c. The personal element therefore enters materially into the contract. The argument for the claimants involves this, that a great steamship company which has agreed to let out one of its vessels may sell the vessel to a man of straw and of no business experience and nevertheless contend that the charterer's rights are entirely unaffected. Such a contention is obviously untenable. The charterers in this case were therefore entitled to refuse to load on the ground that the contract was put an end to by the sale of the ship.

R. A. Wright in reply. The charterers are not by reason of the sale of the ship deprived of the liability of the original owners. They remain liable. The contract is as impersonal as any contract can be. [*Wentworth* v. *Cock* (1) and Carver's Carriage by Sea, 5th ed., ss. 591 and 592, were also referred to.]

ATKIN J. In this case the point raised is as to the effect upon a charterparty of a sale of the ship by the owners between the date of the charterparty and the date of its completion, the purchasers getting the benefit of the charterparty. It is remarkable that there is no direct authority upon the point, and I have therefore to deal with it upon general principles. [His Lordship stated the facts and continued :] Under ordinary circumstances it is quite clear that a contracting party cannot

(1) (1839) 10 Ad. & E. 42.

assign a contract so as to relieve himself of its burdens. He cannot, against the consent of the other party, substitute for himself a person who is put under the sole obligation to perform the contract. On the other hand, he can in the case of many contracts enter into an arrangement by which some other person may perform for him, as far as he is concerned, the obligations of the contract, and the other party will be obliged to accept that performance if it is performance in accordance with the terms of the contract. He will, however, be entitled to hold the original contracting party liable for any breach that may happen, and he is not bound to look to the substituted person in any way. Those principles are plainly set out in the judgment of Sir R. Collins M.R. in *Tolhurst's Case*. (1) Some contracts a contracting party must perform himself, and he may not perform them through an agent or other person whom by any arrangement he chooses to provide for that purpose. Contracts of this character are those which require some special degree of personal skill, taste or judgment on the part of the contracting party, for example, a contract to paint a picture, a contract to write a play or a book.

In the present case the original owners of the ship do not suggest that there has been a novation; the claim made for non-performance of the contract is made by the original owners, and the argument addressed to me on their behalf has proceeded upon the footing that they remain liable to the charterers for the performance of the contract. If they had sought to put upon the charterers the obligation to have the charterparty performed by the purchasers and by them only, I am inclined to think that the charterers would have been justified in saying that there had been a repudiation of the owners' obligations under the contract. That view, however, is not put forward and I have not to decide it. What I have to decide is whether merely by the sale of the vessel, together with the obligation undertaken by the purchasers, the owners have precluded themselves from claiming under the contract. In my opinion they have not. I do not regard this contract as involving a special personal obligation on the part of the shipowners. Obligations no doubt have to be performed, but

(1) [1909] 2 K. B. 660; [1903] A. C. 414.

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the contract is merely one by which the steamer is to proceed to a port, there load a cargo from the shippers, convey it to another port, and there discharge it on being paid freight at a certain rate. There are subsidiary provisions as to the adjustment of the payments that may arise between the parties, and a provision is expressed, or if not expressed would be implied, that the steamer shall be seaworthy. It does not appear to me to be of the essence of that contract that the original owners shall remain owners until the end of the contract. Two cases where a person was allowed to assign a contract in the sense that, although he required the performance to be by a third party, the contract was still in existence, have been cited; these are *British Waggon Co.* v. *Lea* (1) and *Tolhurst* v. *Associated Portland Cement Manufacturers.* (2) In the former case a company had let waggons to the defendants for a lump sum at a yearly rent and agreed to keep the waggons in repair. The company assigned the benefit of that contract to another company who undertook to perform the obligations of the old company as to repairing the waggons, &c. It was held that the original company could perform the contract through the new company and that the defendants were bound to accept that performance, the original company still remaining liable on the contract. That appears to be a much stronger case than the case of a charterparty, and I should be surprised to think that a shipowner who has once entered into a binding engagement to let his ship, whether by voyage charter or by time charter, was precluded from disposing of it except at the risk of having the engagement put an end to on the ground that he has precluded himself from its performance. That is not my idea of what is in the contemplation of charterers or shipowners. It is not necessary for me to deal with *Tolhurst's Case* (2) in the House of Lords. It may be that it goes further and suggests that where a contract is not one of a specially personal character the obligations as well as the benefits of it can be assigned. I very much doubt whether that was the decision; I do not think the decision in the House of Lords went further than the decision in the Court of Appeal except to this extent, that as a matter of procedure the original contracting party in

(1) 5 Q. B. D. 149. (2) [1902] 2 K. B. 660; [1903] A. C. 414.

that case need not be joined as a party to the action. In the present case, which proceeds upon the footing that the original contracting party is claiming, I have no difficulty in coming to the conclusion that they have the right they put forward. It is said by Mr. MacKinnon that in the case of the sale of a ship the obligations of the charterparty might fall to be performed by some one very much less able to carry them out than the original owner. That may be so, but it does not appear to me that such a consideration was in the contemplation of the parties, and one knows that if the obligations are not carried out the charterers would have their remedy. In this case I have the finding that both vendors and purchasers were ready and willing to perform all the obligations under the contract. It seems to me, therefore, that the original owners are not precluded from carrying out the contract by the mere transfer of the ship with the benefit of the charterparty. The award in favour of the claimants must therefore stand.

Judgment for claimants.

Solicitors for claimants: *Parker, Garrett & Co.*
Solicitors for charterers: *W. & W. Stocken.*

J. S. H.

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Nov. 17, 18.

C. GROOM, LIMITED *v.* BARBER.

Sale of Goods—C.i.f. Contract—Payment against Shipping Documents—"War risk for buyer's account"—No Appropriation of Goods to Contract prior to Tender of Documents—Sufficiency of Tender.

A contract of sale on c.i.f. terms contained the condition "War risk for buyer's account":—

Held, that these words did not mean that the seller was to effect an insurance against war risk at the buyer's expense, but that they meant that war risk was the concern of the buyer alone, and that if he desired to cover war risk by insurance he must take out the policy.

In a contract of sale on c.i.f. terms the seller's obligation is performed by delivering to the buyer within a reasonable time from the agreed date of shipment the shipping documents, namely, the bill of lading, the invoice, and the policy of insurance, which will entitle the buyer to obtain, on arrival of the ship, delivery of the goods, or, in case of their loss, will entitle him to recover on the policy their value if they have been lost by a peril agreed to be covered, and in any case will give him any rightful claim against the ship in respect of misdelivery or wrongful treatment of the goods. It is immaterial in whom the property in the goods was before the tender of the documents. The seller must be in a position to pass the property in the goods by the bill of lading if they are in existence, but he need not have appropriated the particular goods in the particular bill of lading to the particular buyer until the moment of tender, nor is it necessary that he should have obtained any right to deal with the bill of lading until that moment.

AWARD by the London Local Appeal Committee of the United Kingdom Jute Goods Association upon an appeal from an award of an umpire.

By a contract in writing dated June 8, 1914, J. F. Barber, of Mincing Lane, London (hereinafter called "the seller"), sold to C. Groom, Limited, of Gracechurch Street, London (hereinafter called "the buyers"), on the terms of the rules and regulations for the time being in force of the United Kingdom Jute Goods Association, and subject to the conditions indorsed upon the contract, 100 bales of Hessian cloth at 18*s.* 6*d.* per 100 yards for shipment from Calcutta, one half between June 1 and 30, and the other half between July 1 and 15, 1914, by steamer and/or steamers to London upon c.i.f. terms, the latter to be with

particular average for gross invoice amount plus 10 per cent. for payment by cash against documents less any usual rebate.

The following were the material conditions indorsed on the contract:—

"4. Should the goods or any portion thereof not arrive from loss of vessel or other unavoidable cause the tender to the buyer of the insurance policy with the bill of lading or other document or documents which with the policy will enable the buyer to recover the amount of the insurance from the underwriters shall be deemed a good tender of the goods so not arriving."

"5. Ship's name to be declared by the first seller without undue delay, and any declaration so made shall be valid as regards successive buyers if passed on without undue delay, and no vessel to be declared which has already entered at the Custom House."

"8. . . . . War risk for buyer's account."

It was admitted that on the same day that this contract was made—June 8, 1914—the seller had bought identical goods upon identical terms except as regards price from Messrs. Becker, Gray & Co., merchants and shippers, of London and Calcutta.

The goods in question in the arbitration proceedings were twenty-five bales which were to be shipped between July 1 and 15.

On July 15 Becker, Gray & Co. duly shipped the said goods at Calcutta in the steamship *City of Winchester*, and on July 16 took out an insurance policy upon the goods which did not cover war risk, or, in other words, contained the customary free from capture and seizure clause.

On August 3 the seller wrote to the buyers calling their attention to the fact that war risk was for their account and that the risk must be covered by them to protect their own interests.

On August 4 the buyers wrote to the seller contending that he was responsible for the insurance against war risk. In his reply the seller called the buyers' attention to condition 8 indorsed upon the contract, according to which the war risk was for the buyers' account.

On August 12 the buyers wrote to the seller with reference to

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the shipment and requested to be informed as to the boat the goods were coming by and when they left Calcutta, as the goods would have to be covered against war risk and the buyers would not get the documents till the boat was nearly in this country. The buyers' letter continued: "Please let us have this information to-morrow so that we can get them covered."

On August 14 the seller replied that he so far had no advice of the name of the steamer carrying the goods.

On August 20 the seller received information regarding the name of the steamer carrying the goods, the information being contained in an invoice received by him from Becker, Gray & Co. Within about an hour of the receipt of this invoice the seller despatched a similar invoice to the buyers.

On August 21 at 2.27 P.M. the loss of the *City of Winchester* was posted at Lloyd's, she having been captured on August 6 by a German cruiser and subsequently sunk. It was not contended that any earlier information was received in London regarding the loss.

The invoice was the only document which the buyers received from the seller. The parties admitted that it was to be presumed from the delivery of an invoice that the seller was in a position to deliver the documents under the contract.

On August 22 the buyers wrote to the seller returning the invoices because the *City of Winchester* had been captured on August 6, and stated that although the buyers had asked previously for the name of the steamer the seller's invoice received on August 21 gave the first advice, and under the circumstances the buyers refused to accept any responsibility in the matter.

The policy which the seller was in a position to tender to the buyers was the usual form of Lloyd's policy containing the free from capture and seizure clause.

The matter was referred to arbitration under the contract, the seller claiming that he was entitled to be paid at the maturity of the shippers' draft, namely, November 23, 1914, the sum of 441*l.* 2*s.*, or such sum at an earlier date less the usual rebate, whilst the buyers contended that they were entitled to refuse the documents and regard the contract as unfulfilled.

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The umpire upheld the seller's contention and made an award in his favour.

On appeal to the appeal committee it was contended on behalf of the buyers:—

1. (*a*) That it was the duty of the seller to insure against risks of war;

(*b*) that there was no proper presentation of documents to the buyers unless the seller tendered or was in a position to tender a policy or policies of insurance which would enable the buyers to recover against the insurer for the loss of the goods;

(*c*) that the documents tendered, or which the seller was in a position to tender, did not constitute a good tender under clause 4 of the contract;

2. (*a*) that no property in the goods passed to the buyers because no goods in a deliverable state were unconditionally appropriated to the contract by the seller with the consent of the buyers;

(*b*) that when the seller invoiced the goods to the buyers and tendered, or was in a position to tender, the documents and purported to appropriate the goods to the contract they had ceased to exist; and as a consequence,

(*c*) that unless the seller tendered, or was in a position to tender, documents which entitled the buyers to receive the goods or to obtain a complete indemnity for their loss the buyers were not bound to pay the price.

The statement made on behalf of the buyers that they could not have insured against war risk until the name of the vessel was known was contrary to the experience of the committee and could not be upheld.

As to the first contention the committee decided as a question of fact that the insurance policy referred to in clause 4 of the conditions was by the custom of the trade a policy which contained the free from capture and seizure clause, that the tender of such a policy was a sufficient tender within the meaning of the contract, and that there was no custom of the trade and it had never been the practice for a seller to effect any war risk insurance for buyer's account, and that the tender of a war risk policy had never in practice been made by merchants or others doing business in jute goods. The committee further

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decided that the legal interpretation of the contract was that the war risk was upon the buyers and that the buyers had no right to claim from the seller the delivery of a policy covering war risk.

As regards the second contention the committee were of opinion that the seller fulfilled his obligation under the contract by intimating to the buyers that he was in a position to deliver the documents deliverable under the contract and that it was the buyers' obligation to take up such documents, and that the fact that the goods had been lost by a war peril and were in consequence not in a deliverable state was not a sufficient ground to relieve the buyers from their obligation under the contract.

The committee consequently decided that the buyers should pay to the seller the sum of 441*l.* 2*s.* on November 23, 1914.

Maurice Hill, K.C., and *L. F. C. Darby*, for the buyers. By clause 4 of the contract the seller was bound to effect such an insurance as would enable the buyers to recover from the underwriters if the goods should be lost. The words "war risk for buyer's account" in clause 8 mean that the insurance is to be effected by the seller but at the buyer's expense. The seller having failed to effect an insurance against war risk has not fulfilled the conditions entitling him to call upon the buyers to accept the documents and pay for the goods. The finding by the appeal committee that by the course of business in this trade the customary form of policy contains the f. c. and s. clause cannot override the express provisions of the contract.

Secondly, the seller is not entitled to recover inasmuch as there was no appropriation of specific goods to the contract until he purported to do so by tender of the documents, and at that time the goods were no longer in existence. What is contemplated by the Sale of Goods Act, 1893, is the appropriation of specific goods. When the seller is himself the shipper he appropriates them to the contract at the moment of shipment, but when the seller is not himself the shipper, as in the present case, the goods must in fact be in existence and in a deliverable condition when he seeks to appropriate them to the buyer. [They cited *Biddell Brothers* v. *E. Clemens Horst Co.*(1)]

(1) [1911] 1 K. B. 214; [1911] 1 K. B. 934.

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F. D. MacKinnon, K.C., for the seller. The obligation of the seller under a contract on c.i.f. terms is "to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer"—per Hamilton J. in *Biddell Brothers* v. *E. Clemens Horst Co.* (1)—and in this case it has been found as a fact that such an insurance was effected, the policy by the custom of the trade containing the f. c. and s. clause. There is no practice or custom by which the seller effects an insurance against war risks. Moreover in this case it is explicitly provided that "war risk is for buyer's account." These words mean that if the buyer wishes a policy against war risk he must effect it.

As to the second point, it has to be borne in mind that although in form contracts such as that in this case are for the sale of goods they are in reality for the sale of documents representing goods. As Earl Loreburn L.C. said in *E. Clemens Horst Co.* v. *Biddell Brothers* (2), "delivery of the bill of lading when the goods are at sea can be treated as delivery of the goods themselves." The argument for the buyers, if sound, will lead to this, that if the goods at the time they are handed over have been damaged by sea perils and are thus not in a merchantable condition the buyer cannot be required to accept the tender of the shipping documents. Such a view would make the sale of goods on c.i.f. terms quite unworkable. There must have been cases innumerable where shipping documents have been tendered and accepted where to the knowledge of every one the goods have gone to the bottom of the sea.

[ATKIN J. Mr. Hill does not dispute that, where the goods have been appropriated to the buyer.]

Appropriation is not necessary prior to the tender of the documents. There was clearly a good tender under clause 4, and the seller is therefore entitled to recover.

Hill, K.C., replied.

ATKIN J., after stating the facts and the contentions before the appeal committee, continued: In a contract on c.i.f. terms the seller has, as stated by Hamilton J. in *Biddell Brothers* v.

(1) [1911] 1 K. B. at p. 220. (2) [1912] A. C. 18.

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E. Clemens Horst Co. (1), to arrange for an insurance on the terms current in the trade which would be available for the buyer. I am satisfied that at the time this contract was made the terms current in the trade were terms which excluded war risk; in other words that the policy would contain the f. c. and s. clause, and therefore, apart from the special terms of this contract, a policy in such terms would be in order. The finding of the appeal committee in that respect makes the matter quite certain. But in this contract there are the words "war risk for buyer's account." It was said that that meant that the seller was bound to take out a policy covering war risk but was entitled to charge the buyer with the expense of it. That would mean that at all times, even in times of peace, a war risk policy must be taken out at the expense of the buyer. I am satisfied that no seller or buyer contemplated such a thing, and if the buyer were charged with the expense of such a policy he would, in ordinary times of peace, be the very first person to object. To my mind these words mean that war risk is the buyer's concern, and if he wants to cover war risk he must get it done. It might be contended that the condition meant that the proper course of business was that the buyer was entitled to ask the seller, when he was taking out the usual policy, to take out one also covering war risk at the buyer's expense. If it could mean that, I am satisfied in this case that the buyer never requested the seller to take out a war risk policy on those terms. When he made his request the buyer never intended to pay the cost, and his intimation was that the seller was bound to take out the policy at his (the seller's) expense. In those circumstances I am satisfied that the buyers' contention on this point fails and that the award that the policy was in order is right.

The next point raises a question of general interest in reference to contracts of sale on c.i.f. terms. It is said that the seller cannot tender documents representing goods which were lost at the time of tender because at the time of the loss no goods had been appropriated to the contract so as to pass the property to the buyer. It is said, therefore, that the goods tendered were non-existent and consequently that the documents were not in

(1) [1911] 1 K. B. 214.

order. The appeal committee deal, or appear to deal, with the point by saying "As regards the second contention the committee were of opinion that the seller fulfilled his obligation under the contract by intimating to the buyers that he was in a position to deliver the documents deliverable under the contract and that it was the buyers' obligation to take up such documents, and that the fact that the goods had been lost by a war peril and were in consequence not in a deliverable state was not a sufficient ground to relieve the buyers from their obligation under the contract"; but I am not sure that that fully deals with the question of the property not being in the buyers at the time of the loss. It was contended by the buyers that in a c.i.f. contract the seller's duty was so to act as to pass the property to the buyer, either on shipment or at any rate in case of loss at some time before the loss, and that if this were not done the seller could not make a valid delivery under the contract inasmuch as there were no goods in existence that could be said to be the buyer's goods or would be so appropriated as to become his goods.

The committee have not dealt with the question of fact as to whether there had been any appropriation of goods to this contract by or on behalf of the seller. In the view that I hold the question is immaterial, but if it became material I think I should, in the absence of any admission, have to refer the case back to the committee for a finding. Upon the evidence as disclosed in the case there does not appear to have been any appropriation, and I shall assume there was none. What is the meaning of a contract on c.i.f. terms? I think the answer has been given authoritatively in the judgment of Hamilton J. in *Biddell Brothers* v. *E. Clemens Horst Co.* (1) where he said this: "The meaning of a contract of sale upon cost, freight, and insurance terms is so well settled that it is unnecessary to refer to authorities upon the subject. A seller under a contract of sale containing such terms has firstly to ship at the port of shipment goods of the description contained in the contract; secondly to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract;

(1) [1911] 1 K. B. 214, at p. 220.

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thirdly to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; fourthly to make out an invoice as described by Blackburn J. in *Ireland* v. *Livingston* (1) or in some similar form; and finally to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage."

In my opinion the result is that the contract of the seller is performed by delivering to the buyer within a reasonable time from the agreed date of shipment the documents, ordinarily the bill of lading, the invoice, and the policy of insurance, which will entitle the buyer to obtain on arrival of the ship delivery of goods shipped in accordance with the contract, or in case of loss will entitle him to recover on the policy the value of the goods if lost by a peril agreed in the contract to be covered, and in any case will give him any rightful claim against the ship in respect of any misdelivery or wrongful treatment of the goods. It therefore becomes immaterial whether before the date of the tender of the documents the property in the goods was the seller's or buyer's or some third person's. The seller must be in a position to pass the property in the goods by the bill of lading if the goods are in existence, but he need not have appropriated the particular goods in the particular bill of lading to the particular buyer until the moment of tender, nor need he have obtained any right to deal with the bill of lading until the moment of tender. If it were otherwise the shipper of goods in bulk, or of goods intended for several contracts, or the intermediate seller who may be the last of a chain of purchasers from an original shipper, might find it impossible to enforce a contract on c.i.f. terms. The seller's obligation cannot depend upon whether the goods are lost or not, and if when there is no loss the property has to pass to the buyer before delivery of the documents, at what stage of the transaction must it pass? Unless it be at the time of shipment I can see no reason for fixing upon any other time than on delivery of the documents, and if it be the law that a tender of documents is ineffectual unless in fact at the moment of shipment the property

(1) (1872) L. R. 5 H. L. at p. 406.

actually passed to the ultimate buyer, it appears to me that business operations would be very seriously embarrassed.

I do not think that the above is inconsistent with the judgment of Kennedy L.J. in *Biddell Brothers* v. *E. Clemens Horst Co.* (1) in the Court of Appeal. Difficult questions arise as to the time when in performance of a contract on c.i.f. terms the property passes to the buyer. But the question when in fact the property passes is distinct from the question whether the seller undertakes as a term of the contract that the property shall pass at a given time, and the Lord Justice in the passage cited, in my view, is only dealing with the former question. After the decision of the House of Lords in the same case I do not think it necessary to consider former cases. The object of the Courts in construing commercial contracts is to try to give effect to the intention of both the contracting parties and not to impose upon business men terms which they never contemplated. If old forms are now used to express different meanings from those read into them in earlier days the Courts should be prompt to recognize the altered use if they are satisfied that there is in fact a change. I do not say that a contract on c.i.f. terms means to-day anything different to what it ever meant, but if the Courts at other times have rightly imputed to the contract a different meaning to what has been suggested, in my judgment the true meaning of the words is now altered.

I am further of opinion that in this particular contract the meaning which I have said is the true meaning of a c.i.f. contract is explicitly stated in clause 4. The amount of the insurance means in my opinion the amount of insurance if the loss is such as was agreed in the contract of sale to be covered by insurance, and in this case I think there was a good tender in the terms of this clause.

The result is that the award in favour of the seller stands and that the buyers must pay the costs.

Judgment for seller.

Solicitors for buyers: *Druces & Attlee.*

Solicitors for seller: *B. A. Woolf & Co.*

(1) [1911] 1 K. B. at p. 956.

J. S. H.

1914
Nov. 11.

SMITH & SONS *v.* PICKERING.

Locomotive—Wagon—Threshing Machine—Locomotives Act, 1898 (61 & 62 *Vict. c.* 29), *ss.* 2, 17.

By s. 2 of the Locomotives Act, 1898, "The weight unloaded of every wagon drawn or propelled by a locomotive shall be conspicuously and legibly affixed thereon"; and by s. 17, "The expression 'wagon' includes any truck, cart, carriage, or other vehicle":—

Held, that in order to constitute a thing a "wagon" within s. 2 it is not necessary that it should be capable, or used for the purpose, of carrying loads, and that the expression includes an ordinary threshing machine.

Case stated by justices of Bury in the county of Lancaster.

The appellants, Messrs. James Smith & Sons, were summoned upon an information under s. 2 of the Locomotives Act, 1898, charging that they being the owners of certain wagons drawn by a locomotive did not conspicuously and legibly affix thereon the weight unloaded of such wagons. At the hearing of the information the following facts were proved:—On February 14, 1914, a locomotive owned by the appellants was proceeding along the main road between Manchester and Bury, and to this locomotive were attached a threshing machine and a straw trusser or presser. On neither of these machines was any indication of its weight affixed. Each of the machines was upon four wheels and was attached to the wheels by means of a framework or under-carriage fastened to and resting on the axles of the wheels, and to these under-carriages the machines were fastened by bolts. Though it would have been possible on removal of the bolts to lift the machines off the frames, the evidence was that they could not in such a condition be used respectively for threshing or trussing.

It was contended for the appellants that, having regard to the definition of "wagon" in s. 17, the machines were not wagons within the meaning of the Act inasmuch as they were not used for carrying loads.

The justices were of opinion that, as the bodies of the machines were detachable from the under-carriages, they were bound by

the judgment of Channell J. in *Williams* v. *Wood* (1) to hold that such under-carriages upon which the bodies were loaded were vehicles, and consequently wagons within s. 2. They accordingly convicted the appellants subject to a case for the opinion of the Court.

Arthur Powell, K.C., for the appellants. These machines were not wagons. The term "wagon" is defined in s. 17, sub-s. 1: "In this Act unless the context otherwise requires . . . . the expression 'wagon' includes any truck, cart, carriage, or other vehicle." It must be a vehicle, and the term "vehicle" is defined in Johnson's Dictionary to be "that in which anything is carried." It must be a structure designed for the carriage of burden. Moreover the very section under which the present information was laid contemplates that as the meaning of the word "wagon," for it speaks of "the weight unloaded of every wagon." The justices thought themselves bound by the case of *Williams* v. *Wood* (1), in which one question was whether a scuffle or a harrow carried on wheels was a wagon, and Channell J. held that "If for the purpose of being carried along a road a harrow is laid upon a framework with wheels, the framework would be a vehicle" and therefore a wagon. Here the justices have indeed found that the bodies of the machines were detachable from the wheel frames and that therefore the latter might be said to be loaded with the bodies, but the operation of so detaching the bodies was not a practical one, for when detached they could not be used for the purpose for which they were intended. To constitute a vehicle the burden to be carried must be something distinct from the structure that is to carry it, whereas here the wheels and the body are all one machine.

J. C. Howard, for the respondent. The magistrates, upon the supposition that a vehicle must be capable of carrying a burden distinct from itself, have found that the vehicle here was the under framework. It is enough to support that finding that the machine was capable of being detached from it. But their supposition was erroneous. A body on wheels may be a vehicle

(1) [1914] W. N. 135.

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although designed to carry nothing but itself. In the very case by which they held themselves bound, *Williams* v. *Wood* (1), Channell J. said: "Equally, I think, if instead of having separate wheels the scuffle or harrow had wheels of its own which could be utilized for conveying it along the road the framework would be a vehicle." The term "vehicle" is a very comprehensive one. It has been held to include a bicycle—*Ellis* v. *Nott-Bower* (2)—although the body carried is that which gives the motive power. The Locomotives Act, 1898, was intended to deal with heavy vehicles, such as required a locomotive to draw them, its main object being to prevent damage to the roads by excessive weight, which is the very mischief which machines such as those in the present case are likely to produce.

Arthur Powell, K.C., in reply.

DARLING J. This case is to my mind a very difficult one to decide. I do not conceal from myself that to allow the appeal might be productive of great public inconvenience and public danger, and I do not profess to be able to approach the decision of the case uninfluenced by that consideration. Although I think we ought to support the decision of the justices I cannot bring myself to support it upon the grounds they gave. They held that these machines were wagons because they thought they were bound so to hold by the decision in *Williams* v. *Wood* (1), and in order to make that case applicable they divided the machines into two parts—into which they are not in my opinion divisible at all—and decided that the frames and wheels were in themselves vehicles and that the bodies of the machines were the loads that those vehicles carried. I cannot accept that reasoning or regard these machines as things which you take to pieces, and say that the lower part is a vehicle which carries the upper part, when in truth it was never meant to be detached from it at all. You must look at a threshing machine or a straw trusser as a whole, and ask the question whether the machine is in its entirety a vehicle. If the justices had been right in their reasoning the weight which would have had to be ascertained and affixed would have been, not that of the whole machine, but only the tare of

(1) [1914] W. N. 135. (2) (1896) 60 J. P. 760.

the lower part which they held to be a vehicle. But I propose to base my judgment upon a wholly different ground. It is quite true that in the earlier sections of this Act there are numerous references to the loading of the wagons therein dealt with. Sect. 2, under which this charge was preferred, requires "the weight unloaded of every wagon drawn or propelled by a locomotive" to be painted on it. Sect. 3 says that "A locomotive shall not be used on any highway to draw more than three loaded wagons"; and s. 4 again speaks of loaded wagons. A good deal therefore may be said in favour of the view that the statute was using the term wagon in the sense of a thing used for carrying burden. But there are other sections in the Act which induce me to come to the conclusion that that is not the sense in which the Legislature was using the word. Thus in s. 5, which deals with the lights required to be carried by a locomotive, it is provided that there shall be "an efficient red light on the rear of the locomotive, or if it is drawing wagons on the rear of the last wagon fixed in such a manner as to be conspicuous." If we were to hold that this appeal ought to succeed it would be quite legitimate to attach a number of these threshing machines to a locomotive without any light on the rear that could be of any possible use. It would not be necessary to attach a light on the rear of the last threshing machine because it would not be a wagon, and though a light would have to be put on the rear of the locomotive it would be useless because it would be hidden by the machines behind it. It is difficult to suppose that the Legislature intended to exempt a dangerous thing like a threshing machine from the necessity of carrying a light while it insisted upon it in the case of a comparatively harmless agricultural wagon. Then it is provided by s. 6 that county councils and the councils of certain boroughs "may by by-law regulate the use of locomotives and of wagons drawn by locomotives on any highway." If we were to hold that these machines were not wagons the councils could not make by-laws with respect to their passage along a highway, though they might do so with respect to an ordinary cart which is a wagon within the definition clause. To my mind, therefore, although it might seem, from the use of the words "loaded" and "unloaded" in some of the sections and from the

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strict dictionary interpretation of a "vehicle" as that in which something is carried, that this appeal ought to succeed, I cannot think that the Legislature really meant that all these precautions should be applied to ordinary agricultural vehicles which give rise to no particular danger, and that at the same time it should be permissible to drag about the roads these much more dangerous machines without any corresponding precautions whatever. I have therefore come to the conclusion, although with considerable hesitation, that the appeal should be dismissed.

SCRUTTON J. I have arrived at the same conclusion, but as I regard the case as one of some difficulty and general importance I propose to state my reasons. The appellants were charged with permitting two wagons to be drawn by a locomotive upon a highway without having their unloaded weight painted upon them. The two wagons in question were a threshing machine and a machine called a straw trussing press, both of which were on four wheels, but neither of them was constructed to carry any load. The magistrates held that these structures on wheels were wagons within the meaning of s. 2 of the Locomotives Act, 1898. By s. 17 of that Act the word "wagon" is defined as including "any truck, cart, carriage, or other vehicle." Now all those words seem to imply that a wagon must be constructed to carry something, and the appellants' contention was that as these machines were not constructed to carry anything they were not wagons within the definition, or within s. 2, under which the information was laid. Some support is lent to that contention by the numerous references to wagons carrying loads to be found in the earlier sections of the Act. Thus s. 1 contains provisions as to giving permission to wagons "to carry weights" in excess of certain specified amounts; s. 2 requires the "weight unloaded" of a wagon to be painted on it; s. 3 limits the number of "loaded wagons" which may be drawn by one locomotive; and s. 4 provides for the erection of weighing machines for weighing "loaded wagons." But when you come to the later sections the reference to the loading of wagons is dropped; and, as was pointed out by my Lord, if these

machines are not to be regarded as wagons, there is no power to make by-laws regulating their use on the highways, and they would not be subject to the statutory provisions as to lighting. Considering those consequences I come to the conclusion that it is not necessary to read into the meaning of the word "wagon" any condition that the particular structure shall be capable of carrying any load other than itself. I see no reason why a heavy superstructure upon wheels should not be described as a vehicle. The magistrates purported to follow the case of *Williams* v. *Wood* (1), and as I was a member of the Court and concurred in the judgment pronounced by Channell J. I should like to say a word about that decision. In that case there was a discussion as to whether the magistrates had found as a fact that certain scuffles and harrows upon wheels were not vehicles, and the Court sent the case back for the facts to be found. The Court intimated that if a harrow were put on a separate frame with four wheels the frame would be a vehicle, and as some harrows have wheels which can be lowered when they go along a road and pulled up again when used in the field, the Court thought that they would equally be vehicles. The Court did not consider the case of an agricultural implement which was not separable from its wheels. Here I agree with my Lord that the machines in the present case are not in any reasonable sense separable from their wheels, and I think the magistrates were straining language when they treated the wheels of a threshing machine as separable from the machine itself. Although it was not necessary in *Williams* v. *Wood* (1) toconsider the question, I think that if the Court had had before them a case similar to the present they would have held the machines to be vehicles and wagons. I agree that the appeal should be dismissed.

HORRIDGE J. I agree.

Appeal dismissed.

Solicitors for appellants: *Joynson-Hicks, Hunt & Co.*
Solicitors for respondent: *Snow, Fox & Co.*

(1) [1914] W. N. 135.

J. F. C.

1914
Nov. 25.

HAYNES *v.* DAVIS.

Adulteration—Analyst's Certificate—Omission to serve Certificate with Summons—Dismissal of Summons—Second Summons for same Offence—Res judicata—Sale of Food and Drugs Act, 1899 (62 & 63 *Vict. c.* 51), *s.* 19, *sub-s.* 2.

An information was preferred against the appellant for having sold milk which was deficient in natural fat and also contained a certain percentage of added water. When the case came on for hearing the magistrate was informed that no certificate of analysis had been served with the summons in accordance with s. 19, sub-s. 2, of the Sale of Food and Drugs Act, 1899, whereupon he dismissed the summons. No evidence as to the facts was given. A second summons was then taken out in respect of the same alleged offence, and with it was served a copy of the analyst's certificate:—

Held (Lush J. dissenting), that the appellant had been in peril of being convicted on the first summons and therefore was entitled to plead autrefois acquit to the second summons.

Grimble v. *Preston* [1914] 1 K. B. 270 applied.

Case stated by the stipendiary magistrate for South Staffordshire.

An information was preferred by the respondent Davis against the appellant Haynes for having on February 16, 1914, sold to the prejudice of the purchaser milk which was not of the nature, substance, and quality demanded.

At the hearing on May 11, 1914, it was proved that the appellant sold on February 16, 1914, to one Harris milk which was deficient of its natural butter fat to the extent of 13 per cent. and contained 20 per cent. of added water. At the opening of the case the appellant's solicitor took an objection to the proceedings on the ground that the matter was res judicata; he pleaded autrefois acquit, and contended that the stipendiary magistrate had no power to rehear the case. The facts as to this objection were as follows: A summons under the Sale of Food and Drugs Act, 1899, in respect of the sale of milk to Harris on February 16, 1914, was served upon the appellant and was returnable on March 11, 1914. Upon that date, when the summons came on for hearing, the magistrate was informed that no certificate of analysis had been served with the summons

in accordance with s. 19, sub-s. 2, of the Sale of Food and Drugs Act, 1899 (1), and he thereupon dismissed the summons. No evidence as to the facts was given.

A fresh summons was issued by the respondent upon April 1, 1914. The information and complaint in that summons were the same and based on the same facts as the summons which was returnable on March 11, 1914, and which the magistrate had already dismissed, save that with the later summons the analyst's certificate was duly served upon the appellant in compliance with s. 19, sub-s. 2.

The magistrate, being of opinion that on the hearing of the summons on March 11, 1914, the appellant was never in peril, as the facts were not further gone into and the summons was dismissed on a point of procedure, heard the case, and, coming to the conclusion that the appellant sold the milk to Harris which was deficient in butter fat and contained added water as alleged, convicted him of the offence charged.

The question for the opinion of the Court was whether the magistrate came to a correct decision in point of law.

C. Doughty, for the appellant. In *Grimble* v. *Preston* (2) it was held that non-compliance with the provisions of s. 19, sub-s. 2, of the Sale of Food and Drugs Act, 1899, as to serving a copy of the analyst's certificate with the summons, is an informality in procedure only which may be waived. That being so, the appellant was in peril of being convicted on the first summons, and therefore he could not be put in peril again for the same offence. No doubt an accused person is not in peril if the magistrate or Court has no jurisdiction to try him. *Rex* v. *Bates* (3) is an illustration of that. In that case it was held that, the fiat of the Attorney-General not having been obtained to a prosecution under the Explosive Substances Act, 1883,

(1) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 19, sub-s. 2: "In any prosecution under the Sale of Food and Drugs Acts the summons shall state particulars of the offence or offences alleged . . . . and there must be served therewith a copy of any analyst's certificate obtained on behalf of the prosecutor."

(2) [1914] 1 K. B. 270.

(3) [1911] 1 K. B. 964.

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there was no jurisdiction to try the indictment. Here, in view of the decision in *Grimble* v. *Preston* (1), it cannot be said that the magistrate had no jurisdiction to deal with the first summons. [*Reg.* v. *Ollis* (2) and *Rex* v. *Simpson* (3) were also cited.]

H. Maddocks, for the respondent. On the first summons, by reason of the omission to serve with it a copy of the analyst's certificate, the appellant never was in peril. In the absence of the service of that certificate the magistrate had no jurisdiction to deal with the summons. It is said for the appellant that the objection could be waived, and *Grimble* v. *Preston* (1) is cited in support of that proposition. That case was really fought on the question of false warranty, but on the point of non-compliance with s. 19, sub-s. 2, of the Sale of Food and Drugs Act, 1899, it is inconsistent with the decision in *Batt* v. *Mattinson* (4), where it was held that the omission to comply with the requirements of the section was not a matter capable of amendment by an adjournment. Moreover, *Grimble* v. *Preston* (1) only shows that the justices were competent to deal with the case after the objection had been waived. In *Davis* v. *Morton* (5) it was held that the withdrawal of a summons in consequence of a technical informality was not equivalent to a dismissal which could be pleaded in bar of subsequent proceedings; and in *Rex* v. *Marsham, Ex parte Pethick Lawrence* (6), Avory J. said: "It is clear that in order to plead such a plea effectually—either a plea of autrefois acquit or autrefois convict—it must appear that the defendant has been legally convicted or legally acquitted, and it is laid down in Chitty on Criminal Law, 2nd ed., vol. i., p. 455, that 'the point in discussion always is whether, in fact, the defendant could have taken a fatal objection to the former indictment; for if he could, no acquittal will avail him.'" That is directly in point in the present case. Here, there was no acquittal on the merits.

Doughty, in reply, referred to *Rex* v. *Barron*. (7)

(1) [1914] 1 K. B. 270.
(2) [1900] 2 Q. B. 758, 780.
(3) [1914] 1 K. B. 66.
(4) (1900) 64 J. P. 615.
(5) [1913] 2 K. B. 479.
(6) [1912] 2 K. B. 362, at p. 365.
(7) [1914] 2 K. B. 570.

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RIDLEY J. In this case the question is whether the appellant was liable to be proceeded against on the second summons. [His Lordship stated the facts and continued:] In *Grimble* v. *Preston* (1) there was considerable argument as to what the result might be of not taking objection to the omission to serve the analyst's certificate with the summons; and the Court took the view that the omission was a mere informality of procedure, the same informality as in this case. It is true that in *Grimble* v. *Preston* (1) the position was not precisely the same as here, because there the person summoned appeared and disputed the facts and thereafter took the objection that the justices had no jurisdiction because of the omission to serve a copy of the analyst's certificate; whereas here no evidence was taken. In *Grimble* v. *Preston* (1) it was held that it was too late to take the objection after the appellant had appeared and disputed the case upon the merits. The Court held that the justices had jurisdiction and that the statutory provision as to serving a copy of the analyst's certificate with the summons was a matter of procedure only. I think therefore that we must treat the absence of the analyst's certificate in this case as a mere informality in procedure. If that is so, was this a case in which upon the first summons the appellant was in peril and in respect of which therefore he could plead autrefois acquit? I think he was in peril and therefore that he was entitled to plead autrefois acquit. The magistrate had jurisdiction unless objection was taken at the proper time to the informality, and unless that objection was taken there was a possibility, and indeed a probability, that the magistrate would proceed to a decision and convict the appellant. The appellant was thus in peril. It is not quite correct to say, although it is rather an attractive phrase, that there must have been an acquittal upon the merits in order that there may be a good plea of autrefois acquit. In whatever way a person obtains an acquittal, whether it be by the verdict of a jury on the merits or by some ruling on a point of law without the case going to the jury, he is entitled to protection from further proceedings. Once there is an acquittal he cannot be tried again for the same offence. I should

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be sorry to see that doctrine altered by any decision of ours. In *Rex* v. *Simpson* (1), which I do not propose to quote at length because it is not upon its facts an authority in this case, some previous authorities on this question were cited, and among these was *Rex* v. *Galway Justices* (2), where Lord O'Brien C.J. made some observations which dealt satisfactorily with this subject. "The question is this," he said (at p. 502), "Can an order of acquittal pronounced by justices at petty sessions, or by a chairman and justices at quarter sessions, one of whom was biassed, be brought up on certiorari and quashed, so that the accused may be subjected to trial again? There is no instance in the history of our law of an acquittal under such circumstances being brought up on certiorari. What is the principle? That a man cannot be put in peril twice for the same offence. Was this man put in peril before the tribunal that is alleged to be biassed? I am of opinion that he was, and for this reason, that the order of a biassed tribunal is voidable only, and not void." In other words it is similar to the decision of this tribunal, which would be a good one unless objection was taken. Lord O'Brien then proceeded: "That such an order is voidable only, and not void, clearly follows from the case of *Dimes* v. *The Grand Junction Canal Co.* (3)—a familiar case, and one of the highest authority. Now, if the order is voidable only, and not void, the accused was in peril when he stood before the tribunal. Though in this case he was acquitted, he might have been convicted. He was certainly in peril, because he might have been arrested and imprisoned on a voidable order, and a very considerable time might elapse before a voidable order could be avoided by proceedings by way of certiorari. Until avoided, a voidable order justifies both arrest and imprisonment." Applying that principle as far as I can, it would not be desirable in the present case to allow the second proceeding against the appellant to stand. Therefore, on the ground that there has been on the former occasion a decision as to which the appellant was entitled to say that he was in peril, he is not to be put in peril again.

(1) [1914] 1 K. B. 66. (2) [1906] 2 I. R. 499.
(3) (1852) 3 H. L. C. 759.

His plea of autrefois acquit was good, and consequently the appeal must be allowed.

AVORY J. I agree, but I prefer to rest my judgment upon the one ground that the plea of res judicata or autrefois acquit depends for its validity upon this one question, whether the accused on the former occasion was in peril of being convicted of the same offence. If he was, the plea of autrefois acquit is good. Here the question whether he was in peril of being convicted on the first occasion depends upon whether the magistrate had jurisdiction to hear and determine the summons in respect of the offence with which the appellant was charged on that occasion. *Grimble* v. *Preston* (1) is a direct authority that the magistrate had jurisdiction to hear the case notwithstanding the provision of s. 19, sub-s. 2, of the Sale of Food and Drugs Act, 1899. Each member of the Court before which that case came decided that the magistrate had jurisdiction although a copy of the analyst's certificate had not been served with the summons, and it appears to me that it cannot be right in such a case to say that a magistrate has jurisdiction to hear and determine the case when a defendant does not take the objection, but that he has no jurisdiction to hear and determine it if the defendant takes the objection that a certain formality of procedure has not been complied with. Of course that depends upon whether the provision of the statute is a condition precedent to the jurisdiction of the magistrate attaching. In my opinion this is not a condition precedent to the attaching of his jurisdiction, and the Court appears to have so decided in *Grimble* v. *Preston*. (1) I cannot believe that a poor man who has no legal assistance and who does not take this objection because he does not know of it is in peril of being convicted, and that the man who has legal assistance and takes the objection never is in peril. The question whether the one or the other is in peril is to be ascertained by inquiring whether the magistrate had jurisdiction to deal with the offence. Apart from any opinion of my own, I think that *Grimble* v. *Preston* (1) decides that the magistrate had jurisdiction. That being so, the magistrate was wrong in convicting the appellant on the second summons.

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LUSH J. I regret to say that I have come to a different conclusion from that arrived at by the other members of the Court. The statute under which the appellant was proceeded against contains a provision that there must be served with the summons a copy of any analyst's certificate obtained on behalf of the prosecution. I take that to mean that before a magistrate shall proceed to adjudicate upon the matter he must be satisfied that a copy of the certificate has been served upon the accused, unless, of course, the accused chooses to waive this requirement. In this case it was not waived, and objection was taken to the non-service, and upon that the magistrate said, and properly said, that he could not proceed further to adjudicate, and he dismissed the summons. When the further summons was taken out against the appellant the question was raised, and is raised now, had the magistrate on the second occasion jurisdiction to deal with the matter, or was the plea which the appellant put in and relied upon that he had already been acquitted of the same offence a good answer to the charge? The magistrate held that it was not a good answer and he convicted the appellant. In my view the magistrate was right. It has been constantly laid down, perhaps in somewhat different terms, that there are three conditions which must be fulfilled before the plea of autrefois acquit can be successfully raised, those three conditions being stated in Russell on Crimes, vol. ii., p. 1982. There the author, after saying that "at common law a man who has once been tried and acquitted for a crime may not be tried again for the same offence if he was 'in jeopardy' on the first trial," proceeds as follows: "He was so 'in jeopardy' if (1.) the Court was competent to try him for the offence; (2.) the trial was upon a good indictment, on which a valid judgment of conviction could be entered; and (3.) the acquittal was on the merits, i.e. by verdict on the trial, or in summary cases by dismissal on the merits, followed by a judgment or order of acquittal." I quite agree that "acquittal on the merits" does not necessarily mean that the jury or the magistrate must find as a matter of fact that the person charged was innocent; it is just as much an acquittal upon the merits if the judge or the magistrate were to rule upon the construction of an Act of Parliament that the accused was in law entitled to be

acquitted as in law he was not guilty, and to that extent the expression "acquittal on the merits" must be qualified, but in my view the expression is used by way of antithesis to a dismissal of the charge upon some technical ground which had been a bar to the adjudicating upon it. That is why this expression is important, however one may qualify it, and I think the antithesis is between an adjudication of not guilty upon some matter of fact or law and a discharge of the person charged on the ground that there are reasons why the Court cannot proceed to find if he is guilty. To my mind that is the true meaning of the expression, and I think that is what Lord Reading C.J. meant in *Rex* v. *Barron* (1), where this expression occurs at p. 574: "The principle on which this plea depends has often been stated. It is this, that the law does not permit a man to be twice in peril of being convicted of the same offence. If, therefore, he has been acquitted, i.e., found to be not guilty of the offence, by a Court competent to try him, such acquittal is a bar to a second indictment for the same offence." In my opinion the statement that a man must not be twice placed in peril or in jeopardy means that he must have been tried on the first occasion and that all the three conditions I have named have been fulfilled. If any one of them has not, still more if all of them have not, been fulfilled, he has not been in peril. The expressions being "in peril" or "in jeopardy" are only compendious ways of saying that the necessary conditions to a plea of autrefois acquit have all been fulfilled. In *Reg.* v. *Miles* (2) Hawkins J. said that the law on this subject, as deducible from the decided cases, was that "where a criminal charge has been adjudicated upon by a Court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence." Unless there has been an acquittal after adjudication on the facts or "merits" there is no ground for the plea of autrefois acquit. Was the present appellant ever in peril? We have been referred to the case of *Grimble* v. *Preston* (3), and no doubt one of the members of the Court there

(1) [1914] 2 K. B. 570. (2) (1890) 24 Q. B. D. 423, at p. 431.
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used language which may be thought to mean that a person is in peril if charged under this Act although the analyst's certificate has not been served with the summons. In my opinion, however, the decision in that case only comes to this, that the person charged before a magistrate may, if he chooses, waive the right which the statute gives him to have the analyst's certificate served with the summons, and thus the informality, which if he insisted upon it would be fatal to the adjudication, is got rid of. *Grimble* v. *Preston* (1) means this and only this, that where a person chooses to take his chance of being acquitted and waives his right to have this formality complied with he cannot afterwards be heard to say that the magistrate had no right to try him. The person charged in such circumstances always has the right at any moment, provided he does not do that which operates as a waiver, to insist that the magistrate should no longer proceed with the adjudication. That right the present appellant exercised, and I find it impossible to satisfy myself that he ever was in peril. How is it possible to reconcile this statement that there was a fatal defect in these proceedings which prevented the magistrate going on to adjudicate, unless the person charged chooses to waive it, with the statement that the same person was running the risk of being properly convicted? I find it difficult to reconcile these two statements. In my view the appellant never was in peril; I do not think that each of the necessary three conditions ever was fulfilled. From the moment that the appellant showed that he did not choose to waive the informality the magistrate had no power to go on with the adjudication. Up to that time the appellant certainly was not in peril, and at that moment the possible peril ceased to have any existence. I think therefore that the magistrate was right and that the appeal should be dismissed.

Appeal allowed.

Solicitors for appellant: *Judge & Priestley, for Philip Bates & Co., Birmingham.*

Solicitors for respondent: *Needham & Barrow, for Alfred Wickham, West Bromwich.*

(1) [1914] 1 K. B. 270.

J. S. H.

[COURT OF CRIMINAL APPEAL.]

1914
Dec. 14.

THE KING *v.* NORMAN.

Criminal Law—False Pretences—Obtaining Credit by False Pretences—Procedure on Indictment containing Counts for both Offences.

Where an indictment contains counts for obtaining goods by false pretences and also counts for obtaining credit under false pretences the prisoner ought not to be tried on them all at the same time; the prosecution should be called upon to proceed on one count at a time.

APPEAL from conviction and sentence at the trial at the Surrey Sessions held at Kingston-on-Thames on October 23 and 24, 1914.

The indictment on which the appellant was charged contained seven counts. The first count charged him with having unlawfully obtained credit from one Thompson to the amount of 25*l.* 2*s.* under false pretences; the second count charged him with obtaining credit from Thompson for the same sum by fraud other than false pretences; the third and fourth counts charged him with similar offences in obtaining credit from one McCarthy; the fifth count charged him with having unlawfully and knowingly pretended to Mrs. Ashton Cross that he was then a farmer carrying on business at Bushey Lees, Ash, in the county of Surrey, that he had had four of his best horses taken by the Government, that he could not carry on his business as a farmer unless he could procure another horse, that he wanted a mare belonging to the said Mrs. Ashton Cross, and that he was then in a position to pay for the said mare, by means of which false pretences he on September 3, 1914, unlawfully obtained from the said Mrs. Ashton Cross one mare with intent to defraud; the sixth count charged him with having on September 3, 1914, unlawfully obtained credit from the said Mrs. Ashton Cross to the amount of 45*l.* under false pretences; the seventh count charged a previous conviction.

The appellant was given in charge of the jury upon the whole indictment except the seventh count, and evidence was given

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upon the various charges. The evidence upon the count of obtaining the mare was that Mrs. Ashton Cross, believing the appellant's statement about being a farmer who had had four of his horses taken by the Government, agreed to sell the mare to him for 50*l.*, 5*l.* deposit to be paid at once and the balance of 45*l.* to be paid the same night; that he obtained the mare and paid the deposit of 5*l.*, but paid nothing more. There was no direction to the jury as to the difference between the offence of obtaining goods by false pretences and the offence of obtaining credit by false pretences.

The jury returned a general verdict of guilty, and the appellant was sentenced to five years' penal servitude.

H. W. Rowsell, for the appellant, was not called upon.

G. Cecil Whiteley, for the Crown.

[LUSH J. In view of the fact that there was no direction to the jury as to the distinction between obtaining the mare by false pretences and the charge in the sixth count of obtaining credit by false pretences, should not the Court, as it did in *Rex* v. *Johnston* (1), construe the verdict of guilty as if it was limited to the lesser offence?]

There was ample evidence to support the verdict on the charge of false pretences and the conviction should stand.

The judgment of the COURT (Darling, Lush, and Atkin JJ.) was delivered by

LUSH J. In this case the appellant was convicted of obtaining a mare by false pretences and of obtaining credit from two persons by false pretences, and was sentenced to five years' penal servitude.

The only case in which he was charged with obtaining a chattel by false pretences was that in which he obtained the mare. The other two charges were confined to obtaining credit by false pretences, with other counts for obtaining credit by fraud other than false pretences, the Debtors Act, 1869, making it an offence to obtain credit by false pretences or by any other fraud. There was evidence against the appellant with regard to

(1) (1913) 9 Cr. App. Rep. 262.

the transaction by which he obtained the mare, and it was very necessary that the jury should be directed with regard to the two ways in which the transaction might be viewed. They should have been directed as to what constituted obtaining a chattel by false pretences and as to what constituted obtaining credit by false pretences. Unfortunately there is not a word in the summing-up directed to that view of the case. No direction at all was given to the jury as to the difference between the two offences or as to any particular evidence pointing to one offence or the other. We do not say that there was no evidence upon which the appellant might have been convicted of obtaining the mare by false pretences, but there was, as I have said, no direction whatever as to what these two offences were or as to what the prosecution had to prove according to whether they charged the appellant with the one or the other. It was a matter of very great importance that the two offences should be kept distinct, because different evidence was admissible in the two cases. Upon that ground we are of opinion that we ought to treat the verdict as a verdict on the lesser charge, namely, that of obtaining credit by false pretences, and to substitute for the sentence of five years' penal servitude that of twelve months' hard labour, which is the maximum sentence for that offence.

We desire to add this: in cases of this kind, where there are several counts and several transactions, in order that the counts charging the prisoner with obtaining chattels by false pretences and the counts charging him with obtaining credit by false pretences should be dealt with on a proper direction, we think the right course to follow is to try the prisoner upon one count or the other and not upon all at the same time. If he is tried upon them all at once very serious difficulties may arise, inasmuch as evidence which is admissible on the charge of obtaining credit by false pretences may not be admissible on the charge of obtaining chattels by false pretences, and when all the evidence on both charges is before the jury it is very difficult, if not impossible, for them to separate the evidence when they come to consider their verdict. It is, therefore, highly important that the prosecution should be called upon to proceed on one count at a time, and that the prisoner should not be tried on all at the

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same time. It will of course be open to the prosecution, if they fail on any one count, to proceed with those remaining.

Sentence reduced.

Solicitor for appellant: *Registrar of the Court of Criminal Appeal.*

Solicitor for the Crown: *Director of Public Prosecutions.*

J. S. H.

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Nov. 24, 25.

COOPER *v.* EVAN COOK'S DEPOSITORIES, LIMITED.

Rag Flock—Sale of Secondhand Mattress and Pillows containing Rag Flock—Rag Flock Act, 1911 (1 & 2 *Geo.* 5, *c.* 52), *s.* 1.

Sect. 1, sub-s. 1, of the Rag Flock Act, 1911, does not apply to the mere sale of secondhand articles of furniture which contain rag flock.

CASE stated by a metropolitan police magistrate.

The respondents were summoned at the instance of the appellant Cooper to answer a complaint for having unlawfully sold flock manufactured from rags which did not conform to the standard of cleanliness prescribed by the Local Government Board.

At the hearing the following facts were proved:—The appellant, who was an inspector in the employment of the Bedding and Allied Trades Association, on April 25, 1914, visited the shop of the respondents, who were furniture removers and secondhand furniture dealers, and there asked for and purchased for 5*s.* a secondhand mattress which bore the respondents' label, and two pillows, all of which were invoiced to the appellant as secondhand bedding, and which the appellant removed on April 27 from the respondents' premises to the office of Mr. Picard, an analyst.

Mr. Picard, who was a qualified analyst, proved that the mattress and pillows were stuffed with rag flock, that he took samples from the mattress and pillows, and that each of them contained parts of soluble chlorine in excess of the thirty parts

of soluble chlorine per 100,000 parts of flock allowed by the Regulations of the Local Government Board dated June 8, 1912.

It was proved by the managing director of the respondents that they were not manufacturers of flock or bedding, that the mattress and pillows had been purchased on February 24, 1914, by the respondents, together with other secondhand furniture, and that from the time of that purchase until the date of the sale to the appellant the respondents had not dealt with or altered the mattress and pillows by process of manufacture or otherwise.

The magistrate held that the sale of the mattress and pillows was not a sale of rag flock within the meaning of the Rag Flock Act, 1911. (1)

The question for the opinion of the Court was whether the magistrate's decision was correct in law.

Holman Gregory, K.C., and *Fox-Davies*, for the appellant. The magistrate ought to have convicted the respondents. The Rag Flock Act, 1911, applies to any person who sells flock, whether as a commodity or in mattresses or cushions, which does not conform to the regulation standard of cleanliness. It is plain from sub-s. 3 of s. 1, which enables a person proceeded against to bring before the Court the person from whom he bought the flock with a warranty, that the Act is not limited in its operation to persons who use flock in the manufacture of articles of upholstery. To sell flock in any form is forbidden if it is not of the prescribed standard of cleanliness. *Cooper* v. *Swift* (2) shows that the Act applies to new cushions which are stuffed with flock,

(1) Rag Flock Act, 1911 (1 & 2 Geo. 5, c. 52), s. 1, sub-s. 1: "It shall not be lawful for any person to sell or have in his possession for sale flock manufactured from rags or to use for the purpose of making any article of upholstery, cushions, or bedding flock manufactured from rags or to have in his possession flock manufactured from rags intended to be used for any such purpose, unless the flock conforms to such standard of cleanliness as may be prescribed by regulations to be made by the Local Government Board, and, if any person sells or uses or has in his possession flock in contravention of this Act, he shall be liable on summary conviction to a fine . . . ."

(2) [1914] 1 K. B. 253.

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and if it applies to them, it is difficult to see why it does not apply to secondhand articles similarly stuffed.

E. H. Tindal Atkinson, for the respondents. The magistrate was right in dismissing the complaint. The scope of the Rag Flock Act, 1911, clearly appears from its title, which states that it is "An Act to prohibit the sale and use for the purpose of the manufacture of certain articles of unclean flock manufactured from rags." The various sections are aimed at those who either sell or use flock as a commodity; they have no application to a person who merely sells secondhand articles which happen to be stuffed with flock. To hold that the Act applied to persons like the respondents would necessitate their obtaining a warranty with each secondhand article of upholstery they purchase or of having the contents of these articles analysed to ascertain whether they could lawfully be dealt in. If the appellant's contention is sound no executor could sell his testator's furniture unless he warranted the quality of the mattresses, &c. The Court will not, unless absolutely compelled to do so by the language of the Act, impose such an intolerable burden upon dealing in secondhand furniture. Sub-s. 5 of s. 1, which enables samples to be taken, clearly points to persons who purvey or manufacture flock; it cannot be intended to apply to manufactured articles. A person who sells a mattress, provided he does not manufacture it, does not sell flock within the meaning of s. 1, sub-s. 1. In *Cooper* v. *Swift* (1) this point was not argued. There the respondent was a manufacturer, so it was useless for him to take this point. [*Gamble* v. *Johnson* (2) was also referred to.]

Holman Gregory, K.C., in reply. No distinction can be drawn for this purpose between new and secondhand articles. A person is selling flock if he sells a flock mattress, just as a person who sells cigarettes sells tobacco. With regard to sub-s. 5 of s. 1 it is to be observed that it is only a person authorized by the sanitary authority who, if he has reasonable cause to believe that an offence against the Act is being committed, is entitled to enter premises and take samples. There is no difficulty in taking samples from a manufactured article.

Cur. adv. vult.

(1) [1914] 1 K. B. 253. (2) [1913] 3 K. B. 149.

RIDLEY J. stated the facts and continued: In this case we have to decide whether there was a sale by the respondents of flock within the meaning of the Rag Flock Act, 1911. Mr. Holman Gregory for the appellant contended that the respondents had sold rag flock, that the Act of 1911 was of universal application, and therefore that it applied to rag flock sold either as a commodity or inside an article of furniture. It seems to me, however, that Mr. Tindal Atkinson's contention is right and that the Act does not apply to a sale in such circumstances as these. In my view s. 1 of the Act was not intended to apply to flock contained in secondhand furniture; it refers only to flock sold as flock, and therefore a person who has in his possession and desires to sell a sofa or an armchair or some other article of furniture which has been stuffed with flock is not within the Act. It would be to stretch the words beyond their natural sense if we were to say that such a person has flock in his possession for sale. Such a person is selling the sofa or armchair or whatever it may be, and not flock. The magistrate was therefore right in dismissing the complaint. The appeal will be dismissed.

AVORY J. I am of the same opinion. I adhere to what I said in *Gamble* v. *Jordan* (1), that the Court ought not to strain the words of the Act to cover other cases although to do so would have the desirable effect of preventing people sleeping on unwholesome mattresses. It appears to me that s. 1, sub-s. 1, of the Act is limited to the case of a person who is selling flock as such, and that it does not extend to the case of a person selling an article of furniture which happens to have a quantity, however small, of flock in it. To adopt the contention of the appellant, the Court would have to hold that it applies to every article of furniture which is sold and which happens to have a small quantity of flock in it. Having regard more particularly to sub-ss. 4 and 5 of s. 1, I come to the conclusion that the Act is limited to persons who are selling or dealing in flock as a commodity, as distinct from persons who are selling furniture which happens to have flock in it. As it is found as a fact that all that

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the respondent did was to sell secondhand articles of furniture which contained flock, the magistrate was right in dismissing the complaint.

LUSH J. I agree. I think it is impossible to say that the Rag Flock Act, 1911, applies not only to the sale of flock as a commodity but also to the sale of any article of upholstery containing flock. The title of the Act, which we are entitled to look at, indicates the contrary, the title being "An Act to prohibit the sale and use for the purpose of the manufacture of certain articles of unclean flock manufactured from rags." That view is confirmed by the language of s. 1, sub-s. 1, more especially when one observes that the sub-section actually refers to upholstery. If the Legislature had intended to prohibit the sale of upholstery containing flock, how comes it that all that it prohibits is the manufacture of upholstery, cushions, or bedding? It is inconceivable that such language would have been used if in addition to the manufacture of articles of furniture the sale of such articles of furniture stuffed with flock was intended to be prohibited. Sub-s. 5 fortifies that view. It speaks of an inspector taking samples. Samples are usually taken from the bulk. It has been contended that under that sub-section an inspector is entitled to open a sofa, or whatever the article of furniture may be, and take away a portion of the flock inside, to have it analysed. If that view were right a person who has furniture for sale may find an inspector coming in and opening every article of furniture he has on his premises and removing therefrom samples of flock, notwithstanding that there is no provision for compensating the owner. It is perfectly plain that the sub-section contemplates samples taken from bulk and not taken from the inside of a manufactured article. I agree, therefore, that the magistrate was right in dismissing the complaint.

Appeal dismissed.

Solicitors for appellant: *Shepheards & Walters.*
Solicitors for respondents: *Doyle, Devonshire & Co.*

J. S. H.

WILLESDEN URBAN DISTRICT COUNCIL *v.* MORGAN.

1914
Nov. 24, 25.

Shops—Weekly Half-holiday—Automatic Machine placed at Door of Shop—Shop "closed for the serving of customers"—Trading elsewhere than in Shop—Shops Act, 1912 (2 *Geo.* 5, *c.* 3), *ss.* 4, 9.

The respondent, who carried on the retail trade or business of a dairyman, locked his shop on the weekly half-holiday so that no would-be customer could obtain access to the interior, but on the same afternoon he had an automatic machine affixed to the door of the shop, and a customer, by putting money in the slot of the machine, could obtain a supply of milk. The reservoir of the automatic machine containing the milk was inside the shop:—

Held (Avory J. doubting), (1.) that the respondent had not by the use of the automatic machine on the weekly half-holiday contravened sub-s. 1 of s. 4 of the Shops Act, 1912, inasmuch as that sub-section, by providing that "every shop shall . . . . be closed for the serving of customers" on the weekly half-holiday, means that the shop shall be closed for the personal serving of customers; and (2.) that the respondent had not contravened s. 9 of the Act, which prohibits trading elsewhere than in shops on the weekly half-holiday, inasmuch as the automatic machine, placed where it was, was part of his shop.

Semble, per Lush J., Sect. 9 is aimed at the personal carrying on in a place not a shop of retail trade or business; it does not apply to trade or business carried on by means of an automatic machine.

Two special cases stated by Middlesex justices.

Two summonses were taken out by the appellant council against the respondent Morgan, the first for contravening s. 4 of the Shops Act, 1912 (1), in not closing his shop on February 26, 1914, on the weekly half-holiday; and the second for contravening s. 9 of the same Act (2) by carrying on on the same date in a place not being a shop the retail trade or business of a dairyman by means of an automatic machine.

(1) Shops Act, 1912 (2 Geo. 5, c. 3), s. 4, sub-s. 1: "Every shop shall, save as otherwise provided by this Act, be closed for the serving of customers not later than one o'clock in the afternoon on one week day in every week."

(2) Sect. 9: "It shall not be lawful in any locality to carry on in any place not being a shop retail trade or business of any class at any time when it would be unlawful in that locality to keep a shop open for the purposes of retail trade or business of that class, and, if any person carries on any trade or business in contravention of this section, this Act shall apply as if he were the occupier of a shop and the shop were being kept open in contravention of this Act . . . ."

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At the hearing the following facts were proved:—

An order was duly made and confirmed extending, as regards Willesden, the provisions of s. 4 of the Shops Act, 1912, to such parts of the retail trade or business of a dairyman as were exempt by sub-s. 6 of s. 4.

The respondent carried on the retail trade or business of a dairyman in Willesden. On February 26, 1914, the appellants' inspector observed that the respondent had had affixed to the door of the entrance to his shop an automatic machine, by means of which a supply of milk was afforded to the public in quantities of one half-pint on the insertion of a penny in the slot provided for that purpose and forming part of the machine. At 3.40 P.M. on that day, being the weekly half-holiday for the respondent's shop, the inspector inserted a penny in the slot, and, on complying with the instructions appearing on the machine, obtained a half-pint of milk from the reservoir of the machine, the reservoir being situated within the shop. The respondent's shop was locked, the blinds were drawn, no goods were exhibited for sale, and it was not possible for any would-be customer to obtain access to the interior of the shop.

For the appellants it was contended on the summons under s. 4 that upon the inspector placing a penny in the automatic machine a complete legal contract between him and the respondent was created and that the sale of milk in the manner described constituted the carrying on of retail trade or business in a shop within the definition in s. 19, sub-s. 1, of the Act (1); and, on the summons under s. 9, that the respondent had carried on in a place not being a shop the retail trade or business of a dairyman at a time when it was unlawful to keep a shop open for that purpose.

For the respondent it was contended that by the use of the automatic machine he was not serving customers within the meaning of s. 4; that he did not carry on on the day in question the trade or business of a dairyman in a place which was not a shop, and that s. 9 did not apply to automatic selling wherever it was carried on.

(1) Sect. 19, sub-s. 1: "In this Act—

"The expression 'shop' includes any premises where any retail trade or business is carried on . . . ."

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The justices were of opinion that the Act had not been infringed by the setting up of the automatic machine, and they found as a fact that on the day in question the respondent's shop was closed for the serving of customers, and that the respondent had not carried on any trade or business in a place not a shop. They accordingly dismissed both summonses.

The question for the opinion of the Court was whether the justices were right in point of law in dismissing the summonses.

Macmorran, K.C., and *G. Rentoul*, for the appellants. The respondent contravened s. 4 of the Shops Act, 1912, and the justices ought to have convicted him. The object of that statute is to secure a weekly half-holiday for shop assistants, and, to ensure that they shall get this, s. 4 provides that every shop, meaning thereby any premises where retail trade or business is carried on, shall be closed for the serving of customers on the weekly half-holiday.

[LUSH J. The question is, does the section forbid the supply of goods, or does it merely prohibit the personal service of customers?]

It forbids the supply of goods. A person going to this automatic machine for milk is being served with milk; it is not necessary that he should be served by some person actually handing over a jug of milk to him.

If the respondent is not liable under s. 4 he is liable under s. 9. By carrying on business by means of this automatic machine the respondent was carrying on in a place not being a shop his retail trade or business of a dairyman. To ensure that there should be no unfair competition between shopkeepers the Legislature has enacted by s. 9 that when a tradesman's shop has to be closed he shall not carry on his business at any other place.

Colam, K.C., and *H. D. Woodcock*, for the respondent. The question is, what is the meaning of the expression "the serving of customers" in s. 4? That meaning ought to be given to it which will carry out the object of the Act, which is to secure a weekly half-holiday for shop assistants. That object is not interfered with by the sale of milk by means of an automatic machine which does not require the attendance of any person

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during the half-holiday. Sub-s. 7 of s. 4 allows sales during the time the shop has to be closed if the articles sold are required in case of illness. That would necessitate the attendance of some assistant; but what the respondent is doing obviates the necessity of any one being on the premises during the half-holiday. The Act is not aimed at the supply of goods, but is aimed only at the personal service of customers. Suppose a shopkeeper sells goods at 11 A.M. on the day for which the half-holiday is fixed, and says to the customer "you cannot have them during the afternoon as it is the weekly half-holiday, but if you like I will leave them in the yard or on the doorstep if you will take the risk of their loss." If the goods were thus left in the yard or on the doorstep it could not be contended that the customer had been served within s. 4.

The appellants are not assisted by s. 9. The milk is drawn from a reservoir which is actually in the shop, and therefore s. 9 is not applicable. But even if it could be said that the automatic machine was at a place other than a shop, no offence has been committed, there being no personal service of customers. Sect. 9 is complementary to s. 4. Under each section personal service must be shown in order to constitute an offence. The object of s. 9 is to prevent an evasion of the Act by a tradesman personally or by his assistants serving customers at a place which is not a shop. The Act never intended to deal with automatic machines; it would be quite impracticable to do so.

Macmorran, K.C., replied.

RIDLEY J., after stating the facts, continued: Was what was done by the respondent a violation of s. 4 or of s. 9 of the Shops Act, 1912? Did the respondent omit to have his shop closed for the serving of customers, or did he carry on his retail trade or business at a place other than a shop? The case is a difficult one. In the first place I come without any doubt to the conclusion that the receptacle containing the milk being inside the shop door was part of the shop, and it was only by a mechanical contrivance that milk could be obtained. I think therefore that we have to deal only with s. 4 of the Act. There are two ways in which s. 4 may be read. The expression "for the serving of customers" may mean what Mr. Macmorran

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has contended it means, that a person who is able to get goods is a customer who has been served, although he may not be personally served by any assistant. In one sense it may be said that he is served because the automatic machine has been provided and put where it is for the benefit of those choosing to use it. The other sense in which the expression is used is that it means the personal serving of customers. We have to choose between these two interpretations. The Shops Act, 1912, was passed for the benefit of those who serve as shop assistants; but it is an Act whose provisions are enforced by the infliction of penalties, and we have therefore to be careful how we construe it. We have to be sure that while we give it a fair reading we do not give it too wide a construction. Being intended for the benefit of those serving in shops, the Act is not intended to prevent people buying goods so long as their doing so does not interfere with the object of the Act. I should not assent to any construction of the Act which would prevent shop assistants obtaining their weekly half-holiday; but I do not think that we should so construe it as to make it apply to the supply of articles by automatic machines unless the language of the Act compels us to do so. Sect. 4 is satisfied by reading the words "for the serving of customers" as meaning "for the personal serving of customers." The construction contended for by Mr. Macmorran carries us too far beyond the object of the Act. In this case there was no interference with the half-holiday of shop assistants by what the respondent did. His shop was locked up, and the automatic machine, previously filled with milk, did not require any personal attendance to enable a customer to get a supply of milk. I have felt some difficulty in the case, but upon the whole I think the narrower construction of s. 4 is the correct one. The justices were therefore right in dismissing the informations. The appeals will be dismissed.

AVORY J. I entertain considerable doubt about this case. I will, however, content myself with expressing that doubt, and not differ from the conclusion arrived at by Ridley J. I agree that the primary object of the Shops Act, 1912, is to secure a weekly half-holiday for shop assistants; but it appears to me that

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the Legislature may have thought that that object might best be secured by imposing an absolute prohibition upon the carrying on of the business of a shop on the weekly half-holiday. If that is so, the scheme of the Legislature may be that shops are to be closed for all purposes of business on that particular afternoon. That seems to me to be quite a reasonable interpretation of the words "shall . . . . be closed for the serving of customers." I cannot help feeling that the construction which the Court is putting upon s. 4, namely, that it is limited to the personal serving of customers, is a narrow construction, but at the same time I am not prepared to differ from the view that it is a possible construction of the words "the serving of customers."

With regard to s. 9 it appears to me plain that this case does not come within it. I agree that the business, whatever it was, carried on during the particular afternoon was carried on at the respondent's shop, and therefore s. 9 has no application. The real difficulty seems to be whether s. 9 ought to be limited in its operation by reference to s. 4. That question should I think be left to be decided when it arises. Personally I have not yet formed any conclusion upon it.

LUSH J. I agree, and as the question raised is of such importance I propose to state my reasons. The case is one in which I think it is most necessary to apply that fundamental rule—a rule founded on good sense rather than on law—that where words in a statute are capable of two different meanings we must carefully consider, before determining which of the two meanings to attribute to them, what the mischief is which the Act was intended to obviate. Reading this Act, and bearing in mind that it is one of a series commencing in 1892, it seems to me abundantly clear that the one object which the Legislature had in view was to restrict the hours during which persons should be employed in serving customers. I quite agree with Mr. Macmorran that, when we come to construe s. 4, and still more when we consider s. 9, the words used are quite capable of the meaning which he asks us to attribute to them, namely, that the shop shall be closed in such a way that no business at all shall be carried on during prohibited hours. But when one bears in

mind that the object of the Legislature was not to prevent persons obtaining goods when they wanted them during any hours, but was only to restrict the hours of employment of those who serve, I think that, if we reasonably can, we ought to adopt the other construction, namely, that the words used in s. 4 mean that the premises are to be closed in such a way that no one is to be employed to serve. That the words are capable of that meaning cannot be controverted. The justices arrived at the conclusion that this case came under s. 4 so far as the question was concerned whether this was a shop or not. They also came to the conclusion that as there was no personal service during prohibited hours there was no offence under s. 4. With that I agree for the reasons I have indicated. It is quite true that this shop was not effectively closed so as to prevent customers getting milk, but it is equally true that it was closed so far as any personal service of the purchaser was concerned. I cannot help being struck by the fact that in another statute passed in 1910, in which the intention of the Legislature clearly was to prevent persons having a supply of goods, very different language was used from that used in this Act. Sect. 61 of the Licensing (Consolidation) Act, 1910, does not speak of serving customers, it actually prohibits the sale of intoxicating liquor and the opening of licensed premises during certain hours. Why was not similar language used if that was intended by the Legislature in this Act? So far from it being used the language actually employed is to my mind only intended to ensure that shop assistants shall not be in the shop. Inasmuch as the justices have found that the respondent's shop was closed for that purpose, no offence was committed.

Sect. 9 is a little more in Mr. Macmorran's favour, because the language there used is "It shall not be lawful . . . . to carry on in any place not being a shop retail trade or business . . . . when it would be unlawful . . . . to keep a shop open." But there again it is perfectly consistent with that language to say that what is prohibited is the personal carrying on of the business. The section certainly must have the same meaning as s. 4, as, if not, this extraordinary result would follow, that, whereas in a shop it is lawful to use an automatic machine, it is not lawful

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to use such a machine for precisely the same goods in a place which is not a shop. I cannot conceive that the Legislature intended to prohibit these machines in places not shops when it permits them in shops. For these reasons I think that under s. 9 also it is the personal carrying on of the trade or business that is forbidden. I agree that the appeals should be dismissed.

Appeals dismissed.

Solicitor for appellants: *W. G. Greig.*
Solicitor for respondent: *Charles May.*

J. S. H.

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Local Government—Alteration of Areas—Adjustment of Financial Relations—Loan Debt—Increase of Burden thrown on Ratepayers—Local Government Board's Provisional Orders Confirmation (No. 7) Act, 1912 (2 & 3 *Geo.* 5, *c. cxxxiii.*), *s.* 2.

By s. 2 of the Local Government Board's Provisional Orders Confirmation (No. 7) Act, 1912 (which is practically identical with s. 1 of the Local Government (Adjustments) Act, 1913), it is enacted that on any adjustment made otherwise than by agreement for the purposes of the Act under s. 32 or s. 62 of the Local Government Act, 1888, or under those sections as modified or adapted by the particular provisional order, "provision shall be made for the payment to any council or other authority affected by the Order of such sum as seems equitable . . . . in respect of any increase of burden which will properly be thrown on the ratepayers of the area of that council or other authority in meeting the cost incurred by that council or other authority in the execution of any of their powers and duties as a consequence of any alteration of boundaries effected by the Order or other change in relation to which the adjustment takes place":—

Held, that where, in consequence of an alteration of boundaries, the council of the district from which a portion of its area has been taken has to levy an extra rate in the pound upon its ratepayers in order to carry out its duties, as for example in paying off a loan debt, there is an "increase of burden" within the meaning of the section, in respect of which there has to be an adjustment.

AWARD stated by an arbitrator in the form of a special case.

By the Queenborough (Extension) Order, 1912, which was confirmed by the Local Government Board's Provisional Orders

Confirmation (No. 7) Act, 1912 (hereinafter called "the confirming Act"), on August 7, 1912, certain portions of the rural district of Sheppey (which parts are hereinafter referred to as "the added area") were added to the borough of Queenborough, and thereupon it became necessary that an adjustment of property and liabilities should be made as between the corporation of Queenborough and the Sheppey Rural District Council pursuant to the provisions of s. 62 of the Local Government Act, 1888. The parties having failed to arrive at an agreement with reference to certain matters, the dispute was referred to an arbitrator.

In the arbitration the arbitrator was called upon by the parties to make an adjustment between them in respect of matters included under certain heads, the material one being in respect of a loan debt of 6035*l.* incurred by the district council for the purpose of constructing sewers and sewage works. That debt had been raised by the district council on and subsequently to June, 1910, and the whole of the money so raised had been expended by them in constructing sewers and sewage disposal works in a portion of a parish in their district of which the added area formed part and which was outside the added area. No part of these sewers and sewage disposal works was situated within the added area, but the burden in respect of the debt was upon and borne by the whole of the said parish.

The rural district council claimed to be paid by the corporation in respect of the outstanding portion of the loan debt (namely, 5605*l.*) a sum of 1232*l.* as representing the proportion of the loan which would have been borne by the added area if the extension had not taken place. That claim was based on s. 2 of the confirming Act and the rules contained in Part I. of the Second Schedule thereto. (1)

(1) Local Government Board's Provisional Orders Confirmation (No. 7) Act, 1912 (2 & 3 Geo. 5, c. cxxxiii.), s. 2: "On any adjustment made otherwise than by agreement for the purposes of either of the Orders or of this Act under section 32 or section 62 of the Local Government Act 1888 or under either of those sections as modified or adapted by such Order—

"(*a*) Provision shall be made for the payment to any council or other authority affected by the Order of such sum as seems equitable in accordance with the rules contained

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It was contended on behalf of the rural district council that the said sum of 1232*l.* was payable to them on the ground that the extension of the borough of Queenborough had had the effect of depriving the rural district council of the contributions of the added area to the burden of the loan, and that therefore a proportionate increase of burden had been thrown on the ratepayers of the remaining portion of the rural district (hereinafter called "the remaining area").

On behalf of the corporation it was contended that in point of law there had been no such increase of burden on the ratepayers of the remaining area as was contemplated by the confirming Act. In the alternative it was contended on their behalf that they were entitled to set off as an asset against the claim of the rural district council in respect of the outstanding loan debt the proportionate part or share of the added area in the present value of the sewers and sewage disposal works which had been constructed with the borrowed moneys and indirectly contributed to the rateable value, and that the amount thereof should be taken to be the sum of 1232*l.* (treating the sum of 429*l.* 18*s.* which had been repaid as the depreciation in value of the sewers and sewage disposal works), with the result that the whole of the claim in respect of the loan would be cancelled by the set-off.

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in Part I. of the Second Schedule hereto in respect of any increase of burden which will properly be thrown on the ratepayers of the area of that council or other authority in meeting the cost incurred by that council or other authority in the execution of any of their powers and duties as a consequence of any alteration of boundaries effected by the Order or other change in relation to which the adjustment takes place . . . ."

Second Schedule, Part I.: "Rules for determining the sum to be paid in respect of increase of burden on ratepayers.

"(1.) Regard shall be had to—

"(*a*) The difference between the burden on the ratepayers which will properly be incurred by the council or other authority affected by the Order in meeting the cost of executing any of their powers and duties and the burden on the ratepayers which would properly have been incurred by that council or other authority in meeting such cost had no alteration of boundaries or other change taken place:

"(*b*) The length of time during which the increase of burden may be expected to continue . . . .'

The arbitrator was of opinion that the question whether in consequence of the extension there had been any and what increase of burden on the ratepayers of the remaining area in respect of the loan was one of fact, and that in deciding that question the fact that the property which had been created with the borrowed money remained with the district council was a circumstance which ought to be considered with reference to the value of the property (in this case sewers and sewage disposal works), and that he ought also to consider whether the ratepayers of the remaining area would in consequence of the extension derive any increase of benefit from the property or of the rights hitherto enjoyed by them over the same which could fairly be set off against the increase of burden. If and so far as it was a question of fact the arbitrator found that there had been in consequence of the extension an increase of burden on the ratepayers of the remaining area within the meaning of the confirming Act to the extent of 1232*l.* in respect of the loan debt, and that the ratepayers would not in consequence of such extension derive any increase of benefit from the said sewers and sewage disposal works or of the rights theretofore enjoyed by them over the same which could fairly be set off against the increase of burden. He awarded alternatively according as the Court answered the following questions in the affirmative or in the negative :—(*a*) Whether he ought to have held that in point of law there had been no such increase of burden on the ratepayers of the remaining area as would entitle the rural district council to maintain their claim in respect of the loan debt of 6035*l.*; or (*b*) whether he ought in point of law to have treated any increase of burden on the ratepayers of the remaining area as cancelled by reason of the fact that the rural district council retained the sewers and sewage disposal works in the construction of which the moneys borrowed had been expended.

Vesey Knox, K.C., and *W. J. Jeeves*, for Sheppey Rural District Council. This case turns on the meaning of the expression "increase of burden" in s. 2 of the confirming Act, 1912, a section which is practically identical with s. 1 of the Local

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Government (Adjustments) Act, 1913. Prior to the decisions in *Caterham Urban District Council* v. *Godstone Rural District Council* (1) and *West Hartlepool Corporation* v. *Durham County Council* (2) arbitrators in adjusting the financial relations of two authorities on an alteration of boundaries under ss. 32 and 62 of the Local Government Act, 1888, were held entitled to take into account the profit which had been made out of the area taken by the authority from which it was taken. In the two cases cited that practice was held to be erroneous, and if the law had not been changed by the confirming Act we could not have substantiated our claim in respect of the loan. We have to show an "increase of burden" on the ratepayers in the Sheppey rural district by reason of the taking away by Queenborough Corporation of a part of the area. The effect of taking away a portion of the contributory area from the rural district was of necessity to raise the rates in the remaining area. The burden of the loan is cast upon a smaller number of ratepayers who will therefore have to pay more. That is an "increase of burden" within the meaning of the section. [They also cited *Midlothian County Council* v. *Musselburgh Magistrates.* (3)]

Courthope-Munroe, *K.C.*, and *J. G. Salmon*, for Queenborough Corporation. Sect. 2 of the confirming Act has no application to the circumstances of this case. That section deals only with future revenue expenditure, and not with debts which are past capital expenditure. It was never intended to get rid of the decisions in the *Caterham Case* (1) and the *West Hartlepool Case.* (2) The section also leaves untouched the decision in *Midlothian County Council* v. *Musselburgh Magistrates.* (3) In that case, a burgh having extended its boundaries so as to embrace part of a county area, the county council, which had raised loans secured on the county rates and repayable by instalments, sought to recover from the burgh the amount of these loans proportional to the assessable area taken over by the burgh. The sheriff, acting as arbitrator, refused the claim on the ground that what was sought was not an adjustment of liabilities, but compensation for loss of assessable area. The

(1) [1904] A. C. 171. (2) [1907] A. C. 246.
(3) 1911 S. C. 463.

Court of Session, however, held that such loans were "liabilities" which might be proper subjects for adjustment, and in his judgment the Lord President said that although the matter was for the arbitrator and not for the Court, the arbitrator ought to put the burden of the debts upon the authority which retained the property or otherwise got the benefit of the expenditure. In this case no portion of the sewage works was in the area taken and no benefit was received by that portion from the works; the whole benefit enured to the Sheppey Rural District Council, who were retaining the works, and therefore no part of the burden should be thrown upon the Queenborough Corporation. The words "increase of burden" in s. 2 of the confirming Act mean the expenditure of a larger or a proportionately larger sum in consequence of the alteration of the areas. There has been no "increase of burden" in that sense in this case. The sum to be raised will be precisely the same. If the contention on the other side is right there must inevitably be an adjustment in every case, because by taking away a portion of a district and adding it to another there must be some alteration of burden on individual ratepayers. [*In re Rochdale Union and Haslingden Union* (1) and *In re Buckinghamshire County Council and Hertfordshire County Council* (2) were also referred to.]

Vesey Knox, K.C., replied.

ATKIN J. In this case I have to determine a question arising in an arbitration in connection with the taking by the Corporation of Queenborough of a portion of the rural district of Sheppey. Upon that extension of the boundaries of Queenborough there had to be an adjustment of the property, income, debts, liabilities and expenses between the two bodies, and as they failed to agree the matter was referred to an arbitrator. On such adjustment it is provided by s. 2 of the confirming Act that "provision shall be made for the payment to any council or other authority affected by the Order of such sum as seems equitable in accordance with the rules contained in Part I. of the Second Schedule hereto in respect of any increase of burden which will properly be thrown on the ratepayers of the area of that council

(1) [1898] 2 Q. B. 206. (2) [1899] 1 Q. B. 515.

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or other authority in meeting the cost incurred by that council or other authority in the execution of any of their powers and duties as a consequence of any alteration of boundaries effected by the Order or other change in relation to which the adjustment takes place." By the rules in Part I. of the Second Schedule, for determining the sum to be paid in respect of increase of burden on ratepayers, "regard shall be had to (*a*) the difference between the burden on the ratepayers which will properly be incurred by the council or other authority affected by the Order in meeting the cost of executing any of their powers and duties and the burden on the ratepayers which would properly have been incurred by that council or other authority in meeting such cost had no alteration of boundaries or other change taken place." The language is slightly altered from that in s. 2 and is a little obscure, but I think the meaning is reasonably plain.

The question arises in respect of a loan of 6035*l.* incurred by the Sheppey Rural District Council for the purpose of constructing sewers and sewage disposal works. Those works were constructed in a part of the district which was outside the area taken by Queenborough, and no part of the works was apparently situated within that area, although part of the burden of defraying the cost of the works was in fact borne by the ratepayers of the area taken. The Sheppey Rural District Council said that an extra burden of 1232*l.* was suffered by their ratepayers because that was the proportionate amount that the ratepayers in the area taken had been contributing towards the expense of the loan. So far as the arbitrator dealt with the matter as a question of fact I am of course bound by his finding. What I have to consider is whether the arbitrator applied wrong principles of law. [His Lordship read the arbitrator's finding and continued:]

The point of law arises in this way: in 1904 the House of Lords decided in the *Caterham Case* (1) that where an area has been taken, the fact that in respect of that area the ratepayers therein had been contributing more than the amount of the expenditure upon it could not be taken into account in adjusting the financial relations of the two authorities. The result was that in ordinary

(1) [1904] A. C. 171.

circumstances a further burden would be thrown upon the ratepayers of the remaining area as they would have to meet the total remaining expenditure without having the benefit of the contribution by the ratepayers of the taken area which was in excess of the expenditure which they had been saved by having that area taken away. The House of Lords decided that that was not a matter proper to be taken into consideration, and the result was that in some, probably in the majority of, cases, when an area is taken away, if the expenditure which is saved to the remaining part is less than the amount which the ratepayers were spending, with other things remaining equal, a further burden would be thrown upon the ratepayers of the remaining area because they would have to pay a larger sum in the pound to meet it; in other words the expenditure remaining constant would fall upon a smaller body of ratepayers. It is contended before me on behalf of Queenborough Corporation that that is still the position, and that it is not a question of adjustment at all to take into account the loss that the ratepayers suffer by having the necessary expenditure in the district falling upon a smaller body of ratepayers with the result that the rates are increased. I think there was ground for saying that in the House of Lords in 1904 that was called "compensation" and not "adjustment." But the matter in that respect has been altered by the confirming Act, and the same is now provided by the general Act of 1913, which is almost in the same terms as the confirming Act, and while no doubt I have to consider the effect of the previous law in construing this statute I am bound to give to it that which appears to be the plain meaning of its terms. It appears to me, on the construction of s. 2 of the confirming Act, that if after an alteration of boundaries a council has, in order to carry out the services which it has to perform, to levy an extra rate per pound upon the remaining ratepayers for the services which it renders to them, that is an "increase of burden" which has to be taken into account and dealt with. I cannot give any other effect to the words of s. 2. Mr. Courthope-Munroe, who argued the case most fully and admirably for Queenborough, contended that there was no increase of burden unless an increase in fact in the expenditure in the remaining area can be shown. That would

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in my opinion defeat the object of the section. I should imagine that it rarely happens that when part of a district is taken the expenditure for corresponding services upon the remaining part is increased; more likely it will remain constant or be diminished, but the burden upon the ratepayers may be very substantially increased. It appears to me therefore that in this case there was an increase of burden and that the arbitrator was entitled to take it into account.

As the burden is in respect of a loan which was originally expended for works wholly outside the area taken, I think that, in estimating the burden which the arbitrator has found to exist, he would be entitled, probably he would be bound, to take into account the benefit that the ratepayers in the remaining area would receive by reason of having the works left in their possession. In this case the arbitrator has taken that matter into account and has come to the conclusion that they have derived no increase of benefit by having the works remaining in their area. He finds that there is no increase of benefit and that there is an increase of burden; and there is evidence upon which he could so find. I can see some difficulty in arriving at this result in some cases, if the right view is that the extra burden thrown upon the ratepayers of the council in meeting the cost of executing any of their powers and duties is to be considered, for, while it may be perfectly true that a burden may be thrown upon the ratepayers in respect of one set of services, there may, in respect of another set of services, be a diminution of burden, and I think it would be proper that one should be taken into account as against the other. It is difficult to do that in practice unless there is a counter-claim. It is obvious that the ratepayers in the case of a rural area may derive an advantage by losing the obligation to perform certain services in the area taken, but the urban authority taking the area may suffer no loss by having to render such services because they can render them much more cheaply than the rural council can. That question, however, does not arise here. Here I am only asked my opinion in respect of this one item of the loan. My answer to question (*a*) is that I cannot say that in point of law the arbitrator should have found that there had been no increase of burden on the ratepayers of

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the remaining area as would entitle the rural council to maintain their claim in respect of the loan. I do not think question (*b*) raises a point of law. I do not think that in point of law the arbitrator ought to have treated the increase of burden as being cancelled or wiped out. The answer to both questions is in the negative, and the award on that footing must stand.

Judgment for rural district council.

Solicitors for Sheppey Rural District Council: *Sismey & Co., for John Copland & Sons, Sheerness.*

Solicitors for Queenborough Corporation: *Busk, Mellor & Co., for C. B. Harris, Sittingbourne.*

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Nov. 17, 18.

Sale of Goods—C.i.f. Contract—Payment against Shipping Documents—Outbreak of War before Tender of Documents—Goods carried in Enemy Ship—Trading with Enemy—Whether Buyers bound to accept Documents.

The claimants, who were an English firm, sold on May 11, 1914, to the respondents, who also were an English firm, "about 300 barrels June and/or July shipment Chilian honey per steamer . . . . cost freight and insurance to Hamburg . . . . Payment net cash in Liverpool in exchange for shipping documents on presentation of same." The honey was shipped at Penco in June on board the German steamship *Menes* and by the bill of lading was to be carried to Hamburg, where it was to be delivered to the claimants or their assigns. A condition indorsed on the bill of lading provided that all questions arising thereunder were to be governed by the law of the German Empire and to be decided in Hamburg. On August 4, 1914, war was declared by Great Britain on Germany; on August 5 a Royal Proclamation was issued warning British subjects against trading in any goods destined for any person resident, carrying on business, or being in the German Empire; and on the same date the claimants tendered the shipping documents to the respondents, who, however, refused to accept the same. The *Menes* had not arrived at Hamburg at the date of the tender of the documents:—

Held, that the respondents were justified in refusing to accept the tender of the documents because by accepting them and obtaining the

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goods they would be carrying out a contract in violation of the Royal Proclamation against trading with the enemy.

AWARD in the form of a special case.

By contract of sale dated May 11, 1914, Duncan, Fox & Co., a Liverpool firm (hereinafter called the claimants), sold to Schrempft & Bonke, another Liverpool firm (hereinafter called the respondents), through a firm of Hale & Paterson, brokers, acting for both parties, inter alia, "about 300 barrels June and/or July shipment Chilian honey per steamer and/or steamers . . . . cost freight and insurance (f.p.a.) to Hamburg . . . . Payment net cash in Liverpool in exchange for shipping documents on presentation of same, and sellers to give buyers policy or policies of insurance covering 2 per cent. over the net invoice amount."

On June 28, 1914, the claimants shipped on board the German steamship *Menes* at Penco 300 barrels of honey, and received a bill of lading, dated June 28, 1914, for carriage of the goods by the said steamship from Penco to Hamburg, there to be delivered to the claimants or their assigns. By clause 16 of the conditions indorsed on the bill of lading it was provided that if the entering of the port of discharge should be considered unsafe by reason of war the master was to have an option of landing the goods at any port more or less near to the port of destination at the shippers' risk and expense. By clause 24 all questions arising under the bill of lading were to be governed by the law of the German Empire and to be decided in Hamburg.

On July 28, 1914, Hale & Paterson wrote to the respondents that the sellers declared shipment of 300 barrels of honey per *Menes* in completion of the contract, and that letter was received by the respondents on the same or the following day.

On the evening of August 4, 1914, war was declared by Great Britain on Germany. On August 5, 1914, a Royal Proclamation against trading with the enemy was issued which warned all persons resident, carrying on business, or being in the British dominions "not to supply to or obtain from the [German] Empire any goods, wares, or merchandise, or to supply to or obtain the same from any person resident, carrying on business,

or being therein, nor to supply to or obtain from any person any goods, wares, or merchandise for or by way of transmission to or from the said Empire, or to or from any person resident, carrying on business, or being therein, nor to trade in or carry any goods, wares, or merchandise destined for or coming from the said Empire, or for or from any person resident, carrying on business, or being therein," and all persons committing, aiding, or abetting any of the aforesaid acts were liable to penalties.

On the same date (August 5) Hale & Paterson received from the claimants a provisional invoice for the goods, and on the same day they sent it to the respondents with a covering letter of that date, which stated that the shipping documents for the parcel were ready and awaited the disposal of the respondents on the terms of the contract. The letter and invoice were received by the respondents. No other tender of documents was made than was contained in the said letter. No question was raised as to the sufficiency of the form of tender, and the arbitrators found as a fact that the respondents waived the necessity of any further or other tender. The documents tendered included the bill of lading and a policy of insurance on the goods. No question was raised with regard to any of the documents except the bill of lading, and the respondents agreed that the other documents were in order.

On August 7, 1914, the respondents telephoned to Hale & Paterson that they could not take up the documents as there was no valid bill of lading, and on the same day they wrote confirming that statement.

The *Menes* had not arrived at Hamburg at the date of the tender of the documents. (1)

The claimants maintained that the documents tendered were in order, and they claimed payment. The respondents maintained that in the circumstances set out the bill of lading was not valid.

The dispute having been referred to arbitration, the arbitrators stated their award in the form of a special case, and in addition to the foregoing facts they found that the bill of lading was

(1) It was stated by counsel for the claimants that the *Menes* was lying at Las Palmas.

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received by the claimants as agents for the respondents and that the property in the goods passed to the respondents at shipment. If they had not so found, they stated that they should have been prepared to find that the property passed to the respondents on receipt by them of the provisional invoice.

The question for the opinion of the Court was whether in the circumstances the tender of the bill of lading (with the other documents) was a good tender of documents under the contract. If that question was answered in the affirmative, the claimants were to recover 350*l.* 10*s.* 7*d.* as the price of the goods; if it was answered in the negative, the claimants were to recover nothing from the respondents.

Barrington-Ward, for the claimants. Under a contract of sale on c.i.f. terms the seller has "firstly to ship at the port of shipment goods of the description contained in the contract; secondly to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract; thirdly to arrange for an insurance upon the terms current in the trade, which will be available for the benefit of the buyer; fourthly to make out an invoice as described by Blackburn J. in *Ireland* v. *Livingston* (1) or in some similar form; and finally to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage": per Hamilton J. in *Biddell Brothers* v. *E. Clemens Horst Co.* (2) That is an exhaustive statement of the seller's duties. In this case the claimants have fulfilled all those requirements. The position at the date of the making of the contract has alone to be regarded. The seller cannot warrant that the goods shipped will reach the port of delivery, or that the contract of affreightment will remain good until the cargo has reached that port. In the absence of special arrangement the property in, and the risk of, the goods passes to the buyer immediately on shipment, and what the seller has to do is to protect him against those losses against which it is usual in the particular trade to insure. Not the goods but their symbols, namely, the shipping documents,

(1) (1872) L. R. 5 H. L. 395, at p. 406. (2) [1911] 1 K. B. 214, at p. 220,

have to be considered, and if these are valid at their inception the seller has fulfilled his obligations. It would be no justification for a refusal by the buyer to accept the shipping documents that the goods were then at the bottom of the sea; it is equally no answer for him to say that the seller cannot lawfully give him the goods. Legal and physical impossibility to deliver the goods are in pari materia. In this case the respondents seek to justify their refusal to accept the documents because of the Proclamation of August 5, 1914, but by virtue of the licence granted by the Board of Trade dated September 25, 1914, they could obtain possession of the goods. That licence states that "British owners of cargo now lying in a neutral port in a ship owned by an enemy may for the purpose of obtaining possession of such cargo pay freight and other necessary charges to the agent of the ship-owner at such port."

Greaves Lord, for the respondents. The respondents were not bound to take up the shipping documents. The obligation on the claimants was to give the respondents delivery of the goods or of effective shipping documents. What they in fact offered was a contract which by virtue of the Royal Proclamation of August 5 it would be illegal for the respondents to carry out. The contract for the carriage of the goods being made with an alien enemy, and the goods being destined to Hamburg, the respondents could only get the goods on paying money to the alien enemy. Such a payment would be illegal as the respondents would be trading in goods which were destined to a person resident or carrying on business in the German Empire.

Barrington-Ward in reply. Although apart from the Board of Trade licence of September 25 there might be some illegality involved when the respondents came to make use of the bill of lading, that does not affect the position as between the claimants and the respondents. The contract is for the sale of certain documents against cash. There might be some force in the argument for the respondents if the documents were to be handed over in Hamburg. But they are not to be handed over there; they are to be handed over in this country. There is no necessary illegality in carrying out the contract.

Cur. adv. vult.

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ATKIN J., after stating the facts and reading the material portions of the Proclamation of August 5, said: The respondents, the buyers, refused to take the documents when tendered to them, saying that the bill of lading was not in order. I am not quite sure that at that time the refusal to accept the tender was based upon the grounds argued before me; the point of illegality, however, is now taken, and, even if it had not been taken, it would, in my opinion, have been the duty of the Court to say that this was a contract which could not be enforced as illegality had supervened, and therefore that the claimants could not compel the respondents to take up the documents because if they did so they would be carrying out a contract in violation of the Proclamation of August 5. I think the point is a perfectly sound one. By the contract the goods were to be delivered to a person resident in or carrying on business in Hamburg, and in those circumstances it appears to me that it cannot be enforced in this country during the duration of the war. A further point might be raised as to the effect of requiring a buyer to accept a bill of lading which might involve his entering into a contract with an alien enemy for the carriage of the goods. The contract is a German contract and a question might be raised as to how far the Bills of Lading Act applies to it. It is unnecessary to deal with that point inasmuch as, the contract being one in respect of goods destined for Germany, it is quite plain that persons carrying it out would be either supplying goods to persons resident or carrying on business in the German Empire, or would be trading in merchandise destined for that Empire. To deal with those goods in the way proposed by the claimants in performance of the contract would be a direct violation of the Proclamation and would be illegal. The respondents therefore were entitled to refuse to carry out the contract, and the award in their favour must stand.

Judgment for respondents.

Solicitors for claimants: *Chester & Co., for Morecroft, Sproat & Killey, Liverpool.*

Solicitors for respondents: *Weightman, Pedder & Co., Liverpool.*

J. S. H.

In re JACKSON.

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Nov. 10, 12.

Solicitor—Costs—Agreement with Client—Application to set aside—"Unfair and unreasonable"—Payment — Attorneys' and Solicitors' Act, 1870 (33 & 34 *Vict. c.* 28), *ss.* 4, 8, 9, 10—*Appeal—Practice and Procedure—Supreme Court of Judicature Act,* 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-s.* 4.

A solicitor was retained to defend a man charged with embezzlement and to act for him in a civil action in which he was defendant. Both retainers were in writing. By the retainer in the criminal proceedings, which was dated June 14, 1912, the client agreed that the solicitor should receive the proceeds of the sale of certain furniture "to cover" the charges of the defence. The solicitor received these proceeds. By the retainer in the civil action the solicitor was to act for the client in the conduct of the action for an inclusive fee of 100 guineas. On October 28, 1912, the client pleaded guilty to the criminal charge and was sentenced to penal servitude. Subsequently judgment was recovered against him under Order XIV. in the civil action.

On February 10, 1914, the appellant, who had been appointed on October 1, 1913, administrator of the client's property under s. 9 of the Forfeiture Act, 1870, applied by summons in the King's Bench Division under s. 8 of the Attorneys' and Solicitors' Act, 1870, to set aside the agreements as to costs, as being unfair and unreasonable, and for the delivery of a bill of costs and for taxation.

The solicitor in answer to the application contended (inter alia) that the amount agreed by the civil retainer had been paid more than twelve months before the application, inasmuch as he had collected, with, as he alleged, the authority of the client, the sum of 100*l.* from a debtor of the client, and that, therefore, by reason of s. 10 of the Act, the application was out of time.

On October 1, 1912, the client had assigned all his real and personal estate to the liquidator of a company which had formerly employed him. On April 1, 1914, the liquidator assigned the estate to the appellant.

On April 4, 1914, the Master made an order setting aside the agreements and ordering the delivery of a bill of costs for taxation. On appeal the judge at chambers set aside the Master's order on the ground that by reason of payment the application was out of time. On appeal to the Divisional Court:—

Held, (1.) that the appeal did not relate to a matter of practice and procedure within s. 1 of the Supreme Court of Judicature Act, 1894, and that the appeal lay to the Divisional Court.

(2.) That the retainer in the criminal proceedings was not an agreement "respecting the amount and manner of payment" of the solicitor's charges within s. 4 of the Attorneys' and Solicitors' Act, 1870.

(3.) That by reason of the assignment of April 1, 1914, the appellant

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had at the date of the Master's order a good title to the client's estate, and was entitled to maintain the application notwithstanding that he might not have had a good title at the date when the summons was issued.

(4.) That, with regard to the retainer in the civil action, the solicitor could succeed on his defence of payment only if the 100*l.* had been received and retained by him in satisfaction of the agreed sum to the knowledge of the client and with the intention on the latter's part that the agreement should in that way be ratified; and that there must be a further inquiry as to the facts relevant to this question.

APPEAL from an order of Atkin J. sitting at chambers allowing an appeal from an order of Master Archibald, made under s. 8 of the Attorneys' and Solicitors' Act, 1870, setting aside two agreements in writing relating to costs and made between one John Clark and the respondent, Thomas Henry Jackson, a solicitor.

The circumstances under which the case arose were as follows:—

John Clark was in 1912 the treasurer and cashier of Procter & Co., Limited, corn brokers, of Liverpool. He speculated largely in futures and became heavily involved. On June 6, 1912, he was arrested on a charge of embezzling upwards of 100,000*l.* of his employers' money. On July 1, 1912, a writ was issued against him by Procter & Co., Limited, claiming 89,307*l.* for money had and received to their use.

Clark instructed the respondent, Thomas Henry Jackson, to act as his solicitor in both the criminal and civil proceedings. The retainer for the criminal proceedings was in the following terms:—

"To Mr. T. H. Jackson, solicitor, 67, Lord Street, Liverpool. I retain and request you to defend me in the criminal proceedings instituted against me by Procter & Co., Limited, and I agree that you shall receive the net proceeds of sale of the furniture amounting to 436*l.* 17*s.* to cover the law charges and disbursements of my defence. Dated this 14th day of June, 1912. John Clark."

"To Mr. John Clark. I undertake your defence in the criminal proceedings for the moneys above stated. Dated this 14th day of June, 1912. Thos. H. Jackson."

The words "amounting to 436*l.* 17*s.*" were inserted in the document on July 4, 1912, after the furniture had been sold and the proceeds of the sale amounting to that sum had been received by the respondent.

The retainer for the civil action was as follows:—

"Procters, Limited *v.* myself. I request and retain you to act for me as my solicitor in the above action at the inclusive fee of one hundred guineas, such fee to cover all disbursements until final judgment. Dated this 9th day of July, 1912. John Clark. To T. H. Jackson, solicitor, Liverpool."

"To Mr. John Clark, H.M. Prison, Liverpool. I accept your retainer and undertake the above work at the figure stated, which figure I acknowledge to have received. Dated this 9th day of July, 1912. Thos. H. Jackson."

The respondent had on June 21, 1912, received the sum of 100*l.* from one Mathers, who owed that sum to Clark. Clark pleaded guilty at his trial and on October 28, 1912, was sentenced to three years' penal servitude.

On July 11, 1912, a summons for judgment under Order XIV. was taken out in the action, but proceedings thereon were stayed until after the conclusion of the criminal proceedings; eventually judgment was recovered under Order XIV. for the amount claimed.

By an indenture dated October 1, 1912, Clark assigned to one Alexander, the liquidator of Proctor & Co., Limited, in liquidation, all his real and personal estate.

On October 1, 1913, Thomas Robertson Derham was appointed by warrant of the Home Secretary under s. 9 of the Forfeiture Act, 1870, administrator of the property of Clark, he being then a prisoner in His Majesty's prison at Maidstone.

On February 10, 1914, Derham applied by summons in the King's Bench Division for an order that the agreements of June 14 and July 9, 1912, be set aside or cancelled under s. 8 of the Attorneys' and Solicitors' Act, 1870, that the respondent be ordered to deliver a bill of the costs in respect of which the agreements had been made, and that the respondent's costs should be taxed in the same manner as if no such agreements had been made.

By an indenture dated April 1, 1914, and made between Alexander and Derham, after reciting that it had been suggested

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by the respondent, but denied by Derham, that the assignment of October 1, 1912, carried with it Alexander's right to receive the balance of any money in the respondent's hands after payment of his proper costs and charges, Alexander assigned to Derham the interest of Alexander, if any, in any money in the respondent's hands which had been paid to the respondent by or on behalf of Clark.

The application was heard by Master Archibald, who on April 4, 1914, made an order setting aside the two agreements, and ordering the respondent to deliver a bill of costs for taxation.

On appeal to the judge at chambers, Atkin J. allowed the appeal and dismissed the application on the ground that the application had not been made within twelve months after the payment of the amounts agreed for under the agreements, as required by s. 10 of the Act of 1870.

From that decision the present appeal was brought to the Divisional Court.

Layton, for the respondent. There is a preliminary objection to the hearing of this appeal. It relates to a matter of practice and procedure, and, therefore, under s. 1, sub-s. 4, of the Supreme Court of Judicature (Procedure) Act, 1894, the appeal lies to the Court of Appeal, and not to the Divisional Court. A summons to review a taxation is practice and procedure: *In re Oddy* (1); and the present application is in substance an application to tax notwithstanding the existence of the agreements. The fact that this is a final appeal does not prevent it from being a matter of practice and procedure. *In re Marchant* (2) is distinguishable, for in that case, as was pointed out in *Yonge* v. *Toynbee* (3), there was an independent application, not made in connection with any action, to enforce an undertaking given by a solicitor. The present case is governed by *In re Oddy*. (1) [He referred to *In re Herbert Reeves & Co.* (4); *In re Roney & Co.* (5); *Bozson* v. *Altrincham Urban District Council.* (6)]

Matthews, K.C. (*Frampton* with him), for the appellant. This

(1) [1895] 1 Q. B. 392.
(2) [1908] 1 K. B. 998.
(3) [1910] 1 K. B. 215.
(4) [1902] 1 Ch. 29.
(5) [1914] 2 K. B. 529.
(6) [1903] 1 K. B. 547.

appeal is properly brought to the Divisional Court. The test as to whether an appeal relates to a matter of practice and procedure is, does the application arise in an action or proceeding in the High Court of Justice? If it does it is practice and procedure; otherwise, it is not: *Watson* v. *Petts* (1); *Long* v. *Great Northern and City Ry. Co.* (2) The present application was made under s. 8 of the Attorneys' and Solicitors' Act, 1870, and when it was made there was no cause or matter in the High Court to which it related. It invites a substantive and final decision of the rights of the parties. On the other hand, in *In re Oddy* (3) the application was to review a taxation; it therefore had reference to a matter which was in the Court, namely, the taxation. It is impossible to distinguish this case from *In re Marchant* (4), and the decision in *Haxby* v. *Wood Advertising Agency* (5) was to the same effect.

HORRIDGE J. In this case a summons was taken out under s. 8 of the Attorneys' and Solicitors' Act, 1870, to set aside two agreements relating to costs. The Master made the order asked for, but on appeal the decision of the Master was reversed by Atkin J. in chambers. An appeal is now brought to this Court, and a preliminary objection has been taken that the appeal ought to have been to the Court of Appeal. In my opinion the appeal is properly brought to this Court. In *In re Marchant* (4) the Court of Appeal held that, where a judge at chambers had made an order upon an originating summons directing a solicitor to pay a sum of money, the matter was not one of practice and procedure and the appeal did not lie direct to the Court of Appeal. In that case Vaughan Williams L.J. said (6): "The present proceeding was an originating summons, which raised the question whether an order ought to be made upon a solicitor to pay a sum of money. It is plain that the judgment on this originating summons is final, for it is a decision which puts an end to the whole question between the parties whichever way the decision may be; under these circumstances it is prima facie not a matter of practice

(1) [1899] 1 Q. B. 54.
(2) [1902] 1 K. B. 813.
(3) [1895] 1 Q. B. 392.
(4) [1908] 1 K. B. 998.
(5) [1913] W. N. 331; 109 L. T. 946.
(6) [1908] 1 K. B. at p. 1000.

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or procedure." It seems to me, if one applies to the present case the reasoning of the judgments in *In re Herbert Reeves & Co.*(1), that the order was a final order. In that case there was a summons for the delivery of a bill of costs and for taxation, and therefore if the order was made it would be followed by taxation, but the Court of Appeal held that the order was final because, whatever order was made upon the summons, the question of the applicant's right to the delivery of the bill and to taxation was finally decided. Therefore the language used by Vaughan Williams L.J. in *In re Marchant*(2) as to an appeal from a final order being prima facie not a matter of practice or procedure applies to this case. The application is not one arising in an action, but is of a special character made under s. 8 of the Attorneys' and Solicitors' Act, 1870, and it is akin to the proceedings in *In re Marchant*(2), and also in *Haxby* v. *Wood Advertising Agency*(3), where the Divisional Court followed and applied *In re Marchant.*(2) I think that those two cases are authorities for holding that in this case the appeal lies to this Court.

My only difficulty has been with regard to *In re Oddy.*(4) It may be, as Mr. Matthews suggests, the explanation of that case is that, as the summons is simply stated to have been to review a taxation, there must have been some matter pending in the High Court, and that it was in working out that matter that the question of taxation arose. But however that may be, in the later cases, and especially *In re Marchant* (2), the point is dealt with so clearly that we are bound to hold that the appeal in this case is not in a matter of practice and procedure.

ROWLATT J. I am of the same opinion. The words practice and procedure are now generally understood to refer to interlocutory matters arising in proceedings in the High Court, and most of the decisions are, I think, consistent with that view. In addition to *In re Marchant* (2), there are the cases of *Watson* v. *Petts* (5) and *Long* v. *Great Northern and City Ry. Co.* (6), in

(1) [1902] 1 Ch. 29.
(2) [1908] 1 K. B. 998.
(3) [1913] W. N. 331; 109 L. T. 946.
(4) [1895] 1 Q. B. 392.
(5) [1899] 1 Q. B. 54.
(6) [1902] 1 K. B. 813.

both of which it was pointed out that the practice and procedure mentioned in s. 1, sub-s. 4, of the Supreme Court of Judicature (Procedure) Act, 1894, cover matters of practice and procedure in connection with a cause or matter in the High Court, and it is of course quite clear that an application for habeas corpus, to take one example, is not a matter of practice and procedure.

With regard to *In re Oddy* (1), I think that the distinction suggested by Mr. Matthews is sound. In that case there had been proceedings in the High Court followed by an ordinary taxation, in the course of which there was a summons to review, and it may very well be that that was the reason why the Court in that case held that the matter of the appeal was practice and procedure.

Preliminary objection overruled.

Matthews, K.C., and *Frampton*, for the appellant. Sect. 4 of the Attorneys' and Solicitors' Act, 1870, enables a solicitor to make an agreement with his client "respecting the amount and manner of payment" for his services. Under ss. 8 and 9, if the terms of the agreement shall not be deemed to be "fair and reasonable," the Court may declare the agreement to be void and may direct the costs incurred in respect of the matters included in the agreement to be taxed. The retainer in the criminal proceedings is not an agreement within s. 4, for under it the solicitor was only to hold the proceeds of the sale as "cover" for his charges, and if the respondent's proper charges amounted to less than that sum (as they must have done) it was his duty to return the balance to his client. In any event, therefore, the appellant is entitled to demand a bill of costs in connection with the criminal proceedings. With regard to the civil retainer, it is said by the respondent, and the judge at chambers held, that the amount agreed for had been paid, and that the application should, therefore, under s. 10 of the Act have been within twelve months of the payment. The first question is what constitutes payment for the purposes of s. 10. It means the same thing as payment within s. 41 of the Solicitors Act, 1843. It is not suggested in this case that Clark himself actually paid the respondent the

(1) [1895] 1 Q. B. 392.

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agreed sum of 100 guineas. The 100*l.* paid to the respondent by Clark's creditor Mathers is not a payment of 100 guineas, and a payment on account is not a payment within s. 10. But there is no evidence that Clark ever assented to this 100*l.* being retained by the respondent in satisfaction of the agreement. Further, money of the client coming to the hand of the solicitor from a third party cannot be regarded as payment unless a bill of costs has previously been delivered: *In re Street* (1); *In re Frape* (2); *In re Stogdon* (3); *In re Baylis.* (4) The applicant is entitled to have a bill of costs delivered, even if he is not entitled to ask for taxation: *Duffett* v. *McEvoy* (5); and therefore so much of the Master's order as directed the delivery of a bill was right, whatever view be taken of the other part of the case.

Another point taken against the appellant is that Clark assigned all his estate to the liquidator of the company by the assignment of October 1, 1912, and that the appellant had no title to any of Clark's assets when these proceedings were instituted. He had, however, acquired a title at the date of the Master's order, by means of the assignment of April 1, 1914, from the liquidator to himself; and, although it may be part of the law of writs, it is no part of the law of procedure that there must be a complete cause of action at the time the action is begun. Another answer to this point is that the right of Clark to have the agreements set aside was not a debt or other chose in action within s. 25, sub-s. 6, of the Judicature Act, 1873, and did not pass by the assignment of October 1, 1912, nor was it assignable in equity *Torkington* v. *Magee* (6); *Prosser* v. *Edmonds.* (7) After the assignment of October 1, 1912, Clark remained the "party chargeable" with the respondent's costs within ss. 37 and 38 of the Solicitors Act, 1843, and the appellant by virtue of his appointment as administrator of his estate stands in the same position as Clark.

Layton, for the respondent. At the date of the assignment of October 1, 1912, the respondent had money in his hands

(1) (1870) L. R. 10 Eq. 165.
(2) [1893] 2 Ch. 284.
(3) (1887) 56 L. J. (Ch.) 420.
(4) [1896] 2 Ch. 107.
(5) (1885) 10 App. Cas. 300.
(6) [1902] 2 K. B. 427,
(7) (1835) 1 Y. & C. 481.

belonging to Clark. That was a chose in action which passed to the liquidator by the assignment. He was therefore the only person who could have instituted proceedings in February, 1914. At that date the appellant had no title, and the subsequent assignment to him, three months after the proceedings had been started, could not cure his want of title at the date when the summons was issued. The point that the criminal retainer is not an agreement within s. 4 of the Act of 1870 was not taken before the Master or the judge. The appellant by his summons treats it as an agreement, for he asks to have it declared void. He ought not to be allowed to say now that it is not an agreement. But the point is not a good one. The parties clearly intended that the respondent was to receive for his services the proceeds of the sale. The word "cover" is not used in the sense in which it is applied to Stock Exchange transactions. With regard to the civil retainer Atkin J. rightly held that there had been payment, and that being so the application to declare the agreements void was out of time and necessarily failed. The Master's order for the delivery of a bill of costs was merely consequential on his declaration of the invalidity of the agreements, and therefore the whole order was rightly set aside.

Matthews, K.C., replied.

HORRIDGE J. This is an appeal from a decision of Atkin J. at chambers reversing an order of a Master for the delivery of bills of costs in certain civil and criminal proceedings. The question arises with regard to two documents, which are said to be agreements, relating to the payment of the costs to be incurred in those proceedings. Before I deal with the facts of the case, I wish to refer to the material sections of the Attorneys' and Solicitors' Act, 1870, under which the application is made. By s. 4 a solicitor is enabled to make an agreement with his client "respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done" by the solicitor, but the section requires that the agreement must be in writing. Then, s. 8 provides that no action shall be brought upon any such agreement, but that any question respecting the validity or

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effect of the agreement may be determined, and the agreement may be enforced or set aside by the Court on motion or petition; and by s. 9, "if the terms of such agreement shall not be deemed by the Court or judge to be fair and reasonable, the same may be declared void" and the Court may direct the costs incurred in respect of the matters included in the agreement to be taxed in the same manner as if the agreement had not been made. By s. 10, if the agreed amount has been paid the Court may, if the special circumstances of the case require the agreement to be reopened, upon application within twelve months after the payment, order the repayment of the whole or any portion of the amount.

In this case a man named Clark had been arrested on a charge of embezzling a very large sum of money, the property of his employers. The respondent, who is a solicitor, obtained from him a retainer in writing to defend him in the criminal proceedings. [The learned judge read the document of June 14, 1912.] The first question which we have to consider is whether that document is an agreement in writing respecting the amount and manner of payment for the services to be rendered by the solicitor within s. 4. I do not think that it is. The document does not refer to the proceeds of the sale, the 436*l.*, as being the amount at which the respondent's charges were to be fixed; it states that that sum is to be received by the solicitor to "cover" the charges and disbursements of the defence. I think that the use of the word "cover" shows that the parties intended that if the costs incurred amounted to less than the sum named the solicitor was to account to his client for the balance, and if the costs exceeded that sum the client was to be liable to pay the excess. Therefore, no question can arise with regard to that document under the Act of 1870. The respondent has never delivered any bill of costs to his client, and under the Solicitors Act, 1843, he might therefore be ordered to deliver his bill. The application in this case was not in fact made under that Act, but the Master made an order for the delivery of a bill, and in the circumstances I think our decision ought to be that the Master's order should stand so far as it relates to the delivery of a bill of costs in connection with the criminal proceedings.

In addition to the criminal proceedings, a civil action was commenced against Clark by his employers, and with regard to that action also a written retainer was given by Clark to the respondent. [The learned judge read the document of July 9, 1912, and the respondent's written acceptance of the retainer.] It is not contended that these documents do not constitute an agreement within s. 4 of the Act of 1870. The question which arises is as to the statement by the respondent that he had received the sum mentioned, the 100 guineas. If he had in fact received payment within the meaning of s. 10 of the Act, then the application was out of time, for it was not made within twelve months of the date of the payment. With regard to this question, and considering the serious nature of the case, we think that the matter ought to go back to the Master for further inquiry in order that the respondent may have a further opportunity of explaining the circumstances under which he received and retained the 100*l.* which he obtained from a debtor of his client. But I desire to state for the guidance of the Master what, in my view, constitutes payment within the meaning of s. 10. The payment must be made in such circumstances as to show that the client understands that in making the payment he is carrying out the terms of the agreement previously entered into and ratifying it. The respondent relies on this sum of 100*l.* received by him from a debtor of his client as constituting payment. If that was intended as a payment on account, it would not be a payment sufficient to bring the case within s. 10, because there would be 5*l.* unpaid, and it would be impossible to say what items in the bill the 100*l.* should be allocated to; but if the 100*l.* was received and accepted by the respondent in satisfaction of the 100 guineas with the knowledge and assent of the client and with the intention on his part to ratify the agreement in this way, then I think there would have been a payment within the meaning of s. 4.

It has not been contended that, if the agreement with regard to the civil action can be reopened, the amount received by the respondent was reasonable. Therefore, if the Master after further inquiry into the facts finds that there has been no payment in the sense I have indicated, the agreement of July 9 must be

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declared void, and the order for the delivery of a bill of costs will stand.

There is one other point raised on behalf of the respondent. In October, 1912, Clark assigned to the liquidator of the company which had employed Clark all his real and personal estate. That assignment was still subsisting when this application was made in February, 1914, and it is said that the right to institute the proceedings under s. 8 of the Act was vested in the liquidator, and not in the appellant, who had been appointed in October, 1913, administrator of Clark's estate under the Forfeiture Act. Mr. Matthews contended that the right to institute proceedings was not such a chose in action as passed to the liquidator under the assignment to him. I do not think it is necessary to consider whether that is so, for there is another answer to this point. On April 1, 1914, that is, after the issue of the summons, but before the hearing, the liquidator executed a re-assignment in favour of the appellant. Therefore, whatever may have been the rights of the parties at the commencement of the proceedings, the appellant's title was at the date of the hearing perfectly in order.

I only wish to add that it does not seem clear that either of the points raised by Mr. Matthews before us was argued before Atkin J., and I do not think he would have made an order setting aside the order of the Master if the case had been as fully argued before him as it has been in this Court.

ROWLATT J. I am of the same opinion. It seems to me that if the right to institute these proceedings did pass to the liquidator by the assignment of October 1, 1912, then equally the right was assigned back by him to the appellant before the date of the Master's order, and therefore at the date of that order there was before the Court a person who was entitled to ask for an order for taxation and repayment. That being so, it was in my opinion right that the order should be made. If the applicant had been the client himself and he had assigned his rights, and it appeared at the hearing that those rights had been re-assigned to him, there would have been no ground for saying that the order was not a proper order at the time it was

made. If Mr. Matthews is right in his contention that the right to make an application under s. 8 of the Act of 1870 did not pass by the assignment, I think it is also open to doubt whether it passed to the administrator by virtue of his appointment under the Forfeiture Act. But although the right to apply to set aside the agreement and to demand a taxation may have remained all the time in the convicted person, I am prepared to hold, if necessary, that the administrator is a person chargeable with the solicitor's costs within the meaning of the Solicitors Act, 1843, and is therefore entitled to apply under ss. 8 and 10 of the Act of 1870, because there is vested in him all the property of the client out of which the payment has been made in respect of which the question arises.

I do not wish to add anything to what Horridge J. has said with regard to the retainer in the criminal proceedings. The only question with regard to the agreement as to the civil action is whether there has been payment. I agree that the case ought to go back to the Master for further investigation on that point. It is desirable that it should be clearly understood what the expression payment in s. 10 really means. I wish to emphasize this point. Payment is an operation in which two parties take part. If a man collects a debt due to his debtor and purports to pay his own debt in that way, it is not really a payment unless the other party knows what is being done and agrees that the sum received in that way by his creditor shall be used in the payment of his debt. It is in order that this aspect of the case should be more fully inquired into that I think the case ought to go back to the Master for further inquiry.

Appeal allowed.

Solicitors for appellant: *Cartwright & Cunningham, for Donnison & Edwards, Liverpool.*

Solicitors for respondent: *Bentley & Jones, for Louis E. Menzies & Co., Liverpool.*

F. O. R.

1914
Nov. 20

GLAMORGAN COAL COMPANY, LIMITED *v.* STANDING JOINT COMMITTEE OF THE QUARTER SESSIONS AND THE COUNTY COUNCIL OF GLAMORGAN.

[1912 G. 1988.]

Riot—Damages—Compensation—Body liable—Standing Joint Committee of Quarter Sessions and County Council—Riot (Damages) Act, 1886 (49 & 50 *Vict.* c. 38), *ss.* 3, 4—*Local Government Act*, 1888 (51 & 52 *Vict.* c. 41), *ss.* 3, 9.

By s. 3 of the Riot (Damages) Act, 1886, claims for compensation under the Act are to be made to the police authority of the district in which the injury took place, and the police authority shall, if satisfied, fix such compensation as appears to them just; s. 4 gives a right of action against the police authority to any person aggrieved by the refusal of the police authority to fix compensation. In counties quarter sessions are the police authority as defined by s. 9 of the Act.

Sect. 3 of the Local Government Act, 1888, transferred to the council of each county all business done by quarter sessions in respect of (inter alia) "any matters arising under the Riot (Damages) Act, 1886." By s. 9 the liabilities of quarter sessions "with respect to the county police" were transferred to the standing joint committee of the quarter sessions and county council appointed under the Act:—

Held, that the county council, and not the standing joint committee, are the police authority for all the purposes of the Riot (Damages) Act, 1886, including the liability to be sued under s. 4.

ARGUMENT of a point of law arising on the pleadings.

The statement of claim was as follows:—

"1. The plaintiffs are and were at all times hereinafter mentioned the owners and occupiers of certain premises situated at Llwynypia in the police district of Pontypridd in the county of Glamorgan consisting of manager's house, offices, stores, power station, engine house, fan house and other buildings with the yard and other premises appurtenant to the same.

"2. The defendants are the standing joint committee of the quarter sessions and the county council of Glamorgan constituted pursuant to s. 30, sub-s. 1, of the Local Government Act, 1888 (51 & 52 Vict. c. 41), and are hereinafter referred to as 'the standing joint committee.'

"3. The standing joint committee is the police authority for the county of Glamorgan.

"4. On November 8 and 9, 1910, portions of the plaintiffs' houses and buildings referred to in paragraph 1 hereof and some of the plaintiffs' property therein were injured and/or destroyed by a number of persons riotously and tumultuously assembled together by reason whereof damage was caused to the plaintiffs to the amount of 244*l.* 13*s.* 7*d.* Full particulars of the houses, buildings, and property so injured and/or destroyed (and of the injuries thereto) and of the said sum of 244*l.* 13*s.* 7*d.* are contained in the claim to and for compensation hereinafter in paragraph 5 referred to and were delivered to the standing joint committee before action brought as in the said last mentioned paragraph alleged.

"5. On November 21, 1910, the plaintiffs in accordance with the regulations made under s. 3, sub-s. 2, of the Riot (Damages) Act, 1886 (1), made a claim to the standing joint committee for

(1) Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38), s. 2: "(1.) Where a house, shop, or building in any police district has been injured . . . . by any persons riotously and tumultuously assembled together, such compensation as herein-after mentioned shall be paid out of the police rate of such district to any person who has sustained loss by such injury . . . ."

Sect. 3: "(1.) Claims for compensation under this Act shall be made to the police authority of the district in which the injury . . . . took place, and such police authority shall inquire into the truth thereof, and shall, if satisfied, fix such compensation as appears to them just."

Sect. 4: "(1.) Where a claim to compensation has been made . . . . , and the claimant is aggrieved by the refusal or failure of the police authority to fix compensation upon such claim, or by the amount of compensation fixed, he may bring an action against the police authority to recover compensation in respect of all or any of the matters mentioned in such claim . . . ."

By s. 9 and the First Schedule to the Act the expression "police authority" in a county means "the justices in general and quarter sessions assembled."

Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3: "There shall be transferred to the council of each county on and after the appointed day, the administrative business of the justices of the county in quarter sessions assembled, that is to say, all business done by the quarter sessions or any committee appointed by the quarter sessions, in respect of the several matters following, namely,—

"(i.) The making, assessing, and levying of county, police, hundred and all rates, and

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compensation to the amount of 244*l.* 13*s.* 7*d.* under the said last mentioned Act in respect of the injury and destruction to their houses, buildings and property hereinbefore in paragraph 4 alleged. The said claim which was in writing and is referred to for the full terms thereof was sent by the plaintiffs to T. Mansell Franklin, the clerk to the standing joint committee.

"6. The standing joint committee failed to fix compensation upon the plaintiffs' said claim and by letter dated June 25, 1912, addressed by their clerk to the plaintiffs' manager refused to fix any compensation upon such claim.

"7. By reason of the failure and refusal of the standing joint committee referred to in the last preceding paragraph hereof the plaintiffs were and are aggrieved and accordingly pursuant to s. 4, sub-s. 1, of the Riot (Damages) Act, 1886, have brought this action against the standing joint committee as the police authority for the county of Glamorgan to recover compensation in respect of all the matters mentioned in their said claim. And the plaintiffs claim 244*l.* 13*s.* 7*d.*"

Paragraph 3 of the defence was as follows: "The defendants will contend at the trial of the action that they are in no way concerned with and have no jurisdiction over any matters or claims arising under the Riot (Damages) Act, 1886, and are under no liability to the plaintiffs therefor, and will rely upon the provisions of s. 3, sub-s. 14, of the Local Government Act, 1888."

It was ordered that the point of law raised in paragraph 3 of the defence be set down for hearing and disposed of at any time before trial.

Randolph, K.C., for the plaintiffs. The question is whether the standing joint committee have rightly been made the

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the application and expenditure thereof, ...

"(xiv.) Any matters arising under the Riot (Damages) Act, 1886."

Sect. 9: "(1.) The powers, duties, and liabilities of quarter sessions and of justices out of sessions with respect to the county police shall . . . . vest in and attach to the quarter sessions and the county council jointly, and be exercised and discharged through the standing joint committee of the quarter sessions and county council appointed as herein-after mentioned."

defendants in this action. Claims for compensation under the Riot (Damages) Act, 1886, have by s. 3 to be made to the "police authority of the district" in which the injury took place, and by s. 4 in the event of a refusal by the police authority to fix compensation a right of action is given against the police authority. By s. 9 and the First Schedule the police authority in a county is defined to be the justices in quarter sessions assembled. Therefore, under the Act of 1886 the position was clear. The question in this case turns on the alterations made with regard to quarter sessions by the Local Government Act, 1888. By s. 3 of that Act certain matters, including any matter arising under the Riot (Damages) Act, 1886, are transferred from quarter sessions to the county council, but the county council is not made the police authority. There was a good reason for this because under s. 9 "the liabilities" of quarter sessions "with respect to the county police" are vested in and attached to the standing joint committee of the quarter sessions and the council appointed under s. 30. The liability of quarter sessions to be sued, as the police authority, under the Act of 1886 is a liability of quarter sessions within the meaning of s. 9. It is also a matter arising with respect to the police within s. 30, for it is a liability occasioned by a riot. [He referred to the Police Act, 1890, and the Police Reservists Allowances Act, 1900, and to *Ex parte Somerset County Council.* (1)]

Greer, K.C., and *Vaughan Williams*, K.C., for the defendants. Before the Act of 1886 the liability to pay compensation for damage caused by a riot lay on the inhabitants of the hundred or other area in which the damage had been sustained. The reason why the Act of 1886 made quarter sessions the police authority for the purposes of the Act and placed the liability on quarter sessions was that quarter sessions were at that date the police authority and the rating authority both for police and county purposes. The expression "police authority" is not used in the Act of 1886 to enlarge any previously existing body, but merely as a short and compendious term to describe the body which in different districts is to administer the Act. Under s. 3 of the Act of 1888 all the administrative work of quarter sessions

(1) (1889) 58 L. J. (Q.B.) 513.

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with regard to matters arising under the Act of 1886 is transferred to the county council. Therefore the county council becomes the police authority to whom claims for compensation are to be made. The county council has to consider the claims and either fix the amount of compensation or refuse to admit them. There is nothing in the Act of 1888 to suggest that the county council is not also the police authority for the purpose of being sued under s. 4 of the Act of 1886. If the argument for the plaintiffs is correct there must be two police authorities; one, the county council, will refuse to admit the claim, and the other, the standing joint committee, will be sued. It is more probable that the Legislature intended that the body to be sued should be the body which has failed in its duty. It is also very unlikely that a body such as the standing joint committee, which has no separate corporate existence and the membership of which fluctuates, should be made the defendants. Sect. 9 does not assist the plaintiffs' contention. A liability to pay damages under the Act of 1886 is not a liability in respect of the county police.

Randolph, K.C., replied.

BANKES J. The preliminary question of law in this case is whether an action, brought under the Riot (Damages) Act, 1886, in respect of damage alleged to have been suffered by the plaintiffs in consequence of a riot in Glamorganshire, has been properly brought against the standing joint committee of the quarter sessions and county council of Glamorganshire, or whether the county council and not the standing joint committee should have been the defendants. The question depends on the construction of a few sections of the Act of 1886 and the Local Government Act, 1888. The Act of 1886 created an entirely new remedy and procedure in respect of damage resulting from a riot. As appears from the preamble to the Act, the liability to pay compensation in such cases had previously been on the hundred or other area in which the property in question had been damaged. The Act of 1886, by s. 2, for the first time placed the liability on the police rate of the district, and s. 3 provides that claims for compensation under the Act shall be made to the police authority of the district, and the

section also provides the machinery for ascertaining whether the claim is one in respect of which compensation shall be made. By s. 4 any person aggrieved by the refusal or failure of the police authority to fix compensation, or by the amount of compensation fixed, may bring an action against the police authority to recover compensation. In the case of a county the police authority of the district is by Sched. I. of the Act defined to be the justices in general or quarter sessions assembled, that is, the body which at the time the Act was passed would raise the police rate. Therefore, if there had been no subsequent legislation affecting the question the justices in quarter sessions would have been the police authority in Glamorganshire, and the right of action given by the Act would have been against them.

In 1888 the Local Government Act was passed, by which, speaking generally, the administrative work of quarter sessions was transferred to the county council, or to the standing joint committee of quarter sessions and the county council. The question which arises in this case is, how has the Act of 1888 dealt with that part of the administrative work of quarter sessions which related to claims for compensation under the Riot (Damages) Act, 1886? There are only two sections of the Act of 1888 which are material. Sect. 3 provides that there shall be transferred to the county council the administrative work of quarter sessions, that is to say, all business done by the quarter sessions in respect of certain matters, including the making and levying of the police rate, and the application and expenditure thereof. That seems to be a strong indication that just as under the Act of 1886 the body which levied the police rate was made the police authority, so under the Act of 1888 the county council is intended to be the police authority for the purposes of the Act of 1886. But the matter does not rest there, for s. 3 also transfers to the county council "any matters arising under the Riot (Damages) Act, 1886." That clearly includes the preliminary procedure laid down by s. 3 of the Act of 1886, the making of the claim to compensation, the consideration of that claim, and the fixing of the amount of the compensation. Those are all matters clearly arising under the Act, and therefore it

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seems to me the whole of the administrative business of quarter sessions under the Act, at any rate up to and including the admission or rejection of the claim, is transferred to the county council. It follows, in my opinion, that the proper body to sue in the present case is the county council, because under s. 4 of the Act of 1886 any person aggrieved by the refusal of the police authority to fix compensation is given a right of action against the police authority, and when once it is established that the county council is the body which has the duty of admitting or refusing to admit the claim it follows that the county council is the proper body to be sued.

It is said that s. 9, sub-s. 1, of the Act of 1888 must either be taken to have limited the effect of s. 3, or has possibly placed the liability on both the county council and the standing joint committee jointly. [The learned judge read s. 9, sub-s. 1, and continued:] I quite agree that ss. 3, 4, and 5 of the Act of 1886 did place a liability on quarter sessions, but I am unable to follow the contention that that was, in the language of s. 9, a liability "with respect to the county police." In my opinion the remedy introduced by the Act of 1886 in no sense created a liability with respect to the county police, and when once that conclusion is arrived at it follows that the liability created by the Act is transferred to the county council exclusively.

For these reasons, my judgment on this preliminary question of law must be for the defendants.

Judgment for defendants.

Solicitors for plaintiffs: *Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

Solicitors for defendants: *Smith, Rundell & Dods, for Morgan, Bruce & Nicholas, Pontypridd.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1914
Oct. 22.

BURRELL & SONS *v.* HIND, ROLPH & CO.

Shipping—Charterparty—Loss of Time—Refusal of Charterers to give Instructions to Master—Costs of Special Case.

APPEAL from a decision of Bailhache J., reported sub nom. *Burrell & Sons* v. *F. Green & Co.*(1) The decision was upon an award in the form of a special case stated by an umpire in an arbitration between charterers and shipowners. The shipowners appealed from an order of Bailhache J. that they should pay the costs of the special case, although they had substantially been successful in the arbitration. There was a cross-appeal by the charterers claiming an allowance of four days twelve hours in respect of time lost through their alleged delay in giving instructions to the captain of the ship, on which point Bailhache J. held himself bound by the findings of fact of the umpire.

Adair Roche, K.C., and *A. Neilson*, for the shipowners.

Maurice Hill, K.C., and *Russell Davies*, for the charterers.

It is unnecessary to set out the arguments or judgments at length.

The COURT (Buckley L.J., Phillimore L.J., and Pickford L.J.) held, first, that there were no facts to warrant the order for costs made by the learned judge; and, secondly, that they were bound by the findings of the umpire as to the delay of the charterers in giving instructions to the captain.

Appeal of shipowners allowed.
Cross-appeal of charterers dismissed.

Solicitors for shipowners: *Botterell & Roche.*
Solicitors for charterers: *Parker, Garrett & Co.*

(1) [1914] 1 K. B. 293.

W. J. B.

C. A.

1914
Oct. 30;
Nov. 3, 4, 5.

[IN THE COURT OF APPEAL.]

PAPWORTH *v.* MAYOR, ALDERMEN, AND COUNCILLORS OF THE METROPOLITAN BOROUGH OF BATTERSEA.

[1912 P. 2125.]

Local Government — London — Sanitary Authority — Highway — Sewer — Defective Gully—Negligence—Nonfeasance—Misfeasance.

APPLICATION of the defendants for judgment or a new trial of an action tried before Horridge J. and a common jury, and reported [1914] 2 K. B. 89.

J. H. Campbell, K.C., and *W. R. Warren*, for the defendants.

Cecil Fitch and *Sidney Lamb*, for the plaintiff.

The arguments and the cases cited were the same as in the Court below, but it is unnecessary to set them out here.

The COURT (Buckley L.J., Phillimore L.J., and Pickford L.J.), without determining any of the points of law argued, were of opinion that, the jury not having found whether the negligence of the defendants in not remedying any defect in the gully or the grid was committed by them in their capacity of sewer authority or in their capacity of road authority, there must be a new trial; they likewise granted a new trial on the ground of excessive damages.

New trial ordered.

Solicitors for plaintiff: *W. W. Young & Son & Ward.*

Solicitor for defendants: *P. Caudwell.*

W. J. B.

SUNDERLAND *v.* GLOVER.

1914
Oct. 28.

County Court—Practice—Jurisdiction—Administration—Estate exceeding 500*l.* *in Value—Order that Action be struck out—Transfer to High Court—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 67, 68, 114.

By s. 67 of the County Courts Act, 1888, it is provided that the county court shall have all the powers of the High Court in (inter alia) actions or matters by legatees in which the estate against or for an account or administration of which the demand may be made shall not exceed in amount or value the sum of 500*l.*

Sect. 68: "If during the progress of any action or matter under the last preceding section it shall be made to appear to the judge that the subject-matter exceeds the limit in point of amount to which the jurisdiction of the Court is therein limited, it shall . . . . be the duty of the judge to direct the action or matter to be transferred to the Chancery Division of the High Court . . . ."

Sect. 114: "Whenever an action or matter is commenced over which the Court has no jurisdiction, the judge shall, unless the parties consent to the Court having jurisdiction, order it to be struck out. . . . .":—

Held, that upon the true construction of these sections the duty of the county court judge is as follows: If upon the face of the proceedings (apart from any evidence given or affidavits filed) it is obvious that the value of the estate exceeds 500*l.*, it is the duty of the county court judge to dismiss the action under s. 114. Where it is a matter in dispute whether the estate is or is not over the value of 500*l.*, the county court judge ought to determine the matter judicially, and if he comes to the conclusion that the value of the subject-matter brings the case within his jurisdiction, it is his duty to go on and hear the action. If, however, he comes to the conclusion that the subject-matter is over 500*l.*, his duty is not to dismiss the action, but to transfer the proceedings to the High Court under s. 68.

APPEAL by the plaintiff, Frances Elizabeth Sunderland, from an order of the judge of the Hampshire County Court.

By s. 67 of the County Courts Act, 1888, it is provided that "the Court shall have and exercise all the powers and authority of the High Court in the actions or matters hereinafter mentioned; (that is to say,)

"(1.) By creditors, legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise), heirs-at-law, or next of kin, in which the personal or real or personal and real estate against or for an account or administration of which

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the demand may be made shall not exceed in amount or value the sum of five hundred pounds."

Sect. 68: "If during the progress of any action or matter under the last preceding section it shall be made to appear to the judge that the subject-matter exceeds the limit in point of amount to which the jurisdiction of the Court is therein limited, it shall not affect the validity of any order already made, but it shall be the duty of the judge to direct the action or matter to be transferred to the Chancery Division of the High Court; and the whole of the procedure in the said action or matter when so transferred shall be regulated by the Rules of the Supreme Court . . . ."

Sect. 114: "Whenever an action or matter is commenced over which the Court has no jurisdiction, the judge shall, unless the parties consent to the Court having jurisdiction, order it to be struck out, and shall have power to award costs in the same manner, to the same extent, and recoverable in the same manner as if the Court had jurisdiction therein, and the plaintiff had not appeared, or had appeared and failed to prove his demand or complaint."

By Order LV., r. 3, of the Rules of the Supreme Court, 1883, "The executors or administrators of a deceased person or any of them, and the trustees under any deed or instrument or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, next of kin, or heir-at-law or customary heir of a deceased person, or as cestui que trust, under the trust of any deed or instrument . . . . may take out, as of course, an originating summons returnable in the chambers of a judge of the Chancery Division for such relief of the nature or kind following, as may by the summons be specified and as the circumstances of the case may require, that is to say, the determination, without an administration of the estate or trust, of any of the following questions or matters:—

"(*a*) Any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin, or heir-at-law, or cestui que trust:

"(*d*) the payment into Court of any money in the hands of the executors or administrators or trustees;

"(*g*) the determination of any question arising in the administration of the estate or trust."

By his will, dated January 19, 1903, one Jonathan Stead Glover appointed his son, the defendant, and his daughter, the plaintiff, executors and trustees thereof, and gave the residue of his estate to the defendant and the plaintiff in equal shares. The testator died on December 29, 1912. His will was proved on April 16, 1913, by the defendant alone, the plaintiff having renounced her right to prove. The amount for which the will was proved by the defendant was 787*l.* 17*s.* 3*d.* gross and 715*l.* 8*s.* 9*d.* net. In November, 1912, the deceased handed over to the defendant the sum of 350*l.*

A dispute arose between the plaintiff and the defendant with regard to that sum of 350*l.* The plaintiff alleged that it was a loan by the testator to the defendant, whereas the defendant alleged that it was a gift to him and formed no part of the testator's estate. In consequence of this dispute the plaintiff took out a summons in the Hampshire County Court on the Equity side and by her particulars of claim, after stating the facts above set out, asked for the determination by the Court of the question which had arisen in the administration of the estate, namely, whether the transaction with regard to the 350*l.* was a gift or a loan. She claimed, (*a*) in the event of the Court coming to the conclusion that the transaction was a loan, an order that the defendant should bring the said sum of 350*l.* into Court, and all other consequential relief. (*b*) Pending the decision of the Court, an injunction restraining the defendant and his agents from parting with any moneys or assets forming part of the estate of the deceased. (*c*) Such further or other relief as might be necessary. She further stated in her particulars that she was willing to renounce her right to an order for general administration of the estate.

On the case coming on for hearing on April 1, 1914, the defendant by his counsel took the preliminary objection that the Court had no jurisdiction to hear the case, the action being in substance one for limited administration of an estate exceeding in amount or value the sum of 500*l.* Counsel for the plaintiff admitted that, if the plaintiff's contention that the 350*l.*

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was a loan was correct, the county court judge could not further proceed with the action. He, however, contended that the county court judge must inquire into the facts of the case, and if he decided that the value of the estate exceeded 500*l.* must transfer the case to the Chancery Division of the High Court under s. 68.

There was nothing upon the face of the proceedings in the action to show what the amount of the deceased's estate was.

The county court judge, after perusing the probate, upheld the contention on behalf of the defendant and ordered the case to be struck out under s. 114, with costs to be paid by the plaintiff. The plaintiff appealed.

P. B. Morle, for the plaintiff. The county court judge had jurisdiction to determine whether the 350*l.* was a loan or a gift, for until that question was decided it could not be determined whether the estate exceeded 500*l.* or not. If the judge had decided that it was a loan and that the estate was therefore more than 500*l.* in value he ought to have transferred the action to the Chancery Division of the High Court under s. 68 of the County Courts Act, 1888, and not struck it out under s. 114. The county court judge has jurisdiction to hear an action brought on the Equity side of the county court until it appears that its subject-matter exceeds 500*l.*: *Birks* v. *Silverwood* (1); *Thomson* v. *Flinn*. (2) The mere fact that the probate of the testator's will includes the 350*l.* as part of the testator's estate is irrelevant. The 350*l.*, whether it was a gift or a loan, as it was handed over by the testator within three years of his death, had to be included for revenue purposes on taking out probate by virtue of s. 38, sub-s. 2 (*a*), of the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), as amended by s. 11 of the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), and s. 59 of the Finance (1909-10) Act, 1910. Unless it appeared on the face of the proceedings that the estate of the deceased was over 500*l.* the county court judge ought to have assumed that it did not exceed that amount in value until the contrary was proved before him.

W. J. A. Brodrick, for the defendant. The question is whether the county court judge ought to have transferred the action to

(1) (1872) L. R. 14 Eq. 101. (2) (1874) L. R. 17 Eq. 415.

the Chancery Division under s. 68 of the County Courts Act, 1888, or have struck it out under s. 114. Where a plaintiff bona fide believes the subject-matter of the action to be not more than 500*l.*, but it turns out that he is mistaken, he is protected by s. 68. The plaintiff invokes the jurisdiction of the Court, and the test is whether the county court judge can, from what he says, see that the value of the estate is over 500*l.* If he can, he is right in striking the case out under s. 114. [*Farquharson* v. *Morgan* (1) was referred to.]

LORD COLERIDGE J. In this case we are of opinion that the learned county court judge was wrong.

The question arises in the administration of an estate and it is common ground that if the subject-matter of the proceedings exceeded in value 500*l.* the judge had no jurisdiction to try it; and it is contended that in that event he ought to act on s. 114 and dismiss the action. That is the course which he took. In my opinion that course is only to be justified in the following circumstances. If it appears upon the face of the proceedings—that is apart from any evidence given or affidavits filed—that the value of the estate exceeds 500*l.*, that is to say, if upon the face of the record it is stated and is obvious that the estate exceeds 500*l.*, in value, it is the duty of the judge to dismiss the action under s. 114. Short of that, where it is a matter in dispute whether the estate is or is not of or over the value of 500*l.*, it is not the statement of the plaintiff that governs the matter, it is a matter in dispute, and the learned county court judge is not entitled to rely upon the statement of one side (be it the plaintiff or the defendant) that the subject-matter of the proceedings is over or under the sum which gives him jurisdiction, and he ought not to decide that question upon a statement which is in conflict with a statement of the other side unless he tries the case—i.e., unless he enters upon the proceedings and arrives at a judicial determination as to where, between the two stories, the truth lies. When he has done that, if he finds that it is the truth that the subject-matter is within his jurisdiction, he should go on and hear it. If it turns out that the subject-matter is

(1) [1894] 1 Q. B. 552.

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over 500*l.*, his duty is not to dismiss the action or matter, but to act upon s. 68 of the County Courts Act, 1888, which directs that in such a case the learned county court judge should transfer the proceedings to the Chancery Division of the High Court. The learned county court judge has not followed that course, but has contented himself, in the absence of any evidence as to his jurisdiction being excluded on the face of the proceedings, by relying on the probate and the allegation made by the plaintiff and disputed by the defendant that the 350*l.* was a loan. To rely upon that as giving him the right to decide (in the absence of anything else) that the jurisdiction was ousted on the ground of the value being over 500*l.* is, in my opinion, not the right way to arrive at the decision. In my judgment the learned county court judge ought either to have heard the case throughout, or to have entered upon the case, and if and when it appeared to him that the fact was proved that the estate was over 500*l.* in amount or value, then to have transferred it to the Chancery Division of the High Court. He has done neither of those things, and I think the case must go back to him and be reheard.

SHEARMAN J. I am of the same opinion. The circumstances of this case are unusual, although I think the meaning of the sections which we are asked to interpret is quite clear. The plaintiff sought, as a legatee, to establish a debt alleged to be due to the testator which was disputed by the defendant. That was a question arising in the administration. Under the former equity procedure that question could not have been decided unless an administration order was made. But now both in the High Court and in the county court, without making a general order for administration, the Court can decide questions arising in the administration. The plaintiff sought, as a legatee, to establish a debt due to the estate. She had only a right to prosecute that claim in a county court if, in accordance with s. 67, sub-s. 1, of the County Courts Act, 1888, the action brought by her was one in which the personal or real or personal and real estate against which the demand was made did not exceed in amount or value the sum of 500*l.* A defendant against whom

that action was brought could only establish an objection to the jurisdiction by satisfying the Court that in fact the estate exceeded in amount or value the sum of 500*l.* The defendant took the point as to the jurisdiction of the Court. There was nothing on the record itself which brought to the knowledge of the Court that the estate exceeded or was claimed to exceed in amount or value 500*l.*, although, doubtless, as an inference from the probate and the allegation made by the plaintiff that the 350*l.* was a loan, that fact might have been inferred. The defendant took the objection that the estate was over 500*l.* not on the ground that in his view and according to the true facts the estate was over 500*l.*, but on the ground that if the plaintiff's allegation was correct that the 350*l.* was a loan, then, together with certain admitted assets, the estate would exceed 500*l.*

That would probably in fact be true if the defendant had abandoned his defence; and the somewhat odd position arose, that the plaintiff was prepared, if the facts had been investigated, to show that, if and as soon as her claim was established, it would be found in fact that the estate exceeded 500*l.* in amount, while the defendant was in Court to prove that the claim was an unfounded one and that, as soon as it was gone into, the estate would prove to be less than 500*l.* in amount. But there being a dispute between the parties as to whether the estate exceeded 500*l.* or not, in my opinion it was the duty of the learned county court judge, not to investigate the belief of the plaintiff nor the disputed points in the action, but to arrive at the real truth as to whether the estate exceeded 500*l.* in amount or value. That inquiry he declined to go into, and in my judgment he was wrong in so doing. The case must therefore go back to him to inquire into the question whether the estate exceeds 500*l.* in amount or value or not. Incidentally it appears, from what we are told, that in the course of that inquiry the real issue between the parties will thereby be tried, and if the plaintiff succeeds in her contention it will be the duty of the judge to direct a transfer to the Chancery Division of the High Court under s. 68 of the County Courts Act, 1888. If, on the other hand, he finds the contrary, he will make no such transfer, and the case will be properly decided in the county court in a way to which no possible objection can be taken.

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In my judgment the learned county court judge did not give to the statute its real effect when he placed upon it the interpretation he did, and as he was wrong, the case must go back to him to decide the question as to his jurisdiction, it being understood that if he decides that the amount of the estate exceeds 500*l.* the matter will then go to the High Court, which will be bound by any orders or findings of the county court judge made during the course of deciding the question of jurisdiction.

Appeal allowed. Case remitted to the county court.

Solicitors for appellant: *Gibson & Weldon, for F. Gowen, Croydon.*

Solicitors for respondent: *Speechly, Mumford & Craig, for Lamport, Bassitt & Hiscock, Newport, Isle of Wight.*

J. E. A.

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Oct. 29, 30.

[IN THE COURT OF APPEAL.]

POULTON *v.* MOORE AND OTHERS.

Estoppel—Right of Way—Mortgage of Dominant Tenement—Release of Right of Way by Mortgagor—Recital in Deed that Mortgagor "is entitled"—Precise and Unambiguous Recital—Subsequent Reconveyance by Mortgagees of Dominant Tenement—Purchaser from Mortgagor's Legal Representative—Right of Purchaser to exercise Right of Way.

The owner of two adjoining plots of land conveyed the western plot with a house thereon to his wife in fee simple together with a right of way over the eastern plot. The wife then conveyed the western plot and house by way of mortgage in fee simple together with the right of way over the eastern plot. Subsequently, while the mortgage was subsisting, the husband, who still remained the owner of the eastern plot, by deed, dated May 25, 1907, conveyed that plot to the plaintiff in fee simple for value, and the wife joined in the deed for the purpose of releasing the eastern plot from the right of way. The deed contained a recital that "under and by virtue of a certain indenture of conveyance" (identifying it) "the said Ann Williams" (the wife) "is entitled to a right of way at all times and for all purposes for the said Ann Williams her heirs and assigns owners and occupiers of" the house on the western plot "over and across" the eastern plot, and that it had been agreed that she should join in the deed for the purpose of releasing the land thereby conveyed from such right of way; and the deed in its operative part

stated that she "hereby releases the said piece of land and hereditaments hereby conveyed from" the right of way reserved to her by the said indenture. The mortgage was not referred to in this deed, nor had the plaintiff notice of it. The wife died, leaving all her property to her husband and appointing him executor of her will, and later the husband died, having appointed Rowell his executor. Subsequently Rowell paid off the mortgage, and the mortgagees conveyed the western plot and the house thereon to him. Rowell thereupon conveyed the western plot and house for value to the defendant together with the right of way over the eastern plot. The defendant had no notice of the release of the right of way. The defendant claimed to exercise the right of way:—

Held by the whole Court, that the right of way was released by the deed of May 25, 1907, except as regards the rights of the mortgagees, and that upon the reconveyance by the mortgagees their right to take possession of the mortgaged premises and to exercise the right of way determined and the right of way became absolutely released and extinguished; and that therefore the defendant was not entitled to the right of way claimed.

Held, also, by Buckley and Phillimore L.JJ., Pickford L.J. not agreeing, that the recital in the deed of May 25, 1907, was sufficiently precise to estop the defendant, who claimed through the wife, from asserting that the right of way was not released.

APPEAL from the judgment of a Divisional Court reversing the judgment of the Stroud County Court.

The action was brought for a declaration that the defendants or other the owners or occupiers for the time being of a house called Willow Cottage were not entitled to any right of way over the plaintiff's land nor to any easement of light over the plaintiff's land for a certain window in the said house; an injunction; and damages for trespass.

By a deed dated May 7, 1897, Cornelius Williams, who was the owner in fee simple of two adjoining plots of land (hereinafter called the western land and the eastern land respectively), as beneficial owner conveyed the western land with a dwelling-house thereon known as Willow Cottage to his wife, Ann Williams, in fee simple for her separate use for valuable consideration, "together with a right of way at all times and for all purposes for the said Ann Williams her heirs and assigns owners or occupiers for the time being of the premises hereinbefore described over and across the paths coloured brown" on the plan indorsed on the deed. These paths coloured brown were on the

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eastern land retained by Cornelius Williams. On May 8, 1897, Ann Williams, as beneficial owner, in consideration of an advance, by deed conveyed Willow Cottage and the western land by way of mortgage to certain mortgagees in fee simple, "together with a right of way at all times and for all purposes for the mortgagees their heirs and assigns owners or occupiers for the time being of the premises hereinbefore described over and across the paths coloured brown" on the plan in the deed of May 7, 1897.

The eastern wall of Willow Cottage stood on the boundary line dividing the two plots of land, and it had a window overlooking the eastern land with a right for access of light thereto. In 1907 the plaintiff, who was a builder, agreed to purchase the eastern land, and Mrs. Williams agreed with the plaintiff for valuable consideration to allow him to block up the window and a door giving access from the cottage to the paths above mentioned, and he accordingly blocked them up at his own expense before the execution of the conveyance. On May 25, 1907, a deed, to which Cornelius Williams and his wife were parties, was executed by the first part of which C. Williams as beneficial owner conveyed the eastern land to the plaintiff in fee simple for valuable consideration, and the second part was as follows: "And whereas under and by virtue of a certain indenture of conveyance dated the 7th day of May, 1897, and made between the said Cornelius Williams of the one part and the said Ann Williams of the other part the said Ann Williams is entitled to a right of way at all times and for all purposes for the said Ann Williams her heirs and assigns owners and occupiers of Willow Cottage aforesaid over and across certain paths coloured brown on the plan indorsed on the said indenture, and it has been agreed for the said Ann Williams to join in these presents for the purpose of releasing the said hereditaments hereby conveyed from such rights of way . . . . And this indenture witnesseth that in pursuance of the said agreement and in consideration of the sum of five shillings now paid by the said Joseph Charles Poulton"—the plaintiff—"to the said Ann Williams (the receipt whereof the said Ann Williams hereby acknowledges) the said Ann Williams hereby releases the said piece of land and hereditaments hereby conveyed from all rights of road reserved to her by the said

indenture of the 7th day of May, 1897." The mortgage of May 8, 1897, was not recited in the deed, and the deed was executed without the concurrence of the mortgagees; and the plaintiff had no notice of the mortgage. Mrs. Williams died on December 10, 1907, having by her will appointed her husband sole executor thereof and devised to him all her real estate absolutely. On November 18, 1909, Cornelius Williams died, having by his will appointed the defendant Rowell sole executor thereof and devised his property to him, including Willow Cottage and the western land, on trust for sale. Rowell thus became Mrs. Williams' legal personal representative. On March 14, 1910, Rowell paid off the mortgage debt on Willow Cottage and the western land, and the mortgaged premises were conveyed by the mortgagees to him in fee simple discharged from the mortgage debt to hold the same on the trusts of the will of Cornelius Williams.

By an indenture dated March 25, 1910, which recited the mortgage deed of May 8, 1897, and the reconveyance of March 14, 1910, Rowell as trustee conveyed to the defendant Eliza Jane Moore Willow Cottage and the western land, then in the occupation of her husband, in fee simple as her separate property, for valuable consideration, "together with a right of way at all times and for all purposes for the said Eliza Jane Moore her heirs and assigns owners or occupiers for the time being of the premises hereinbefore described over and across the paths coloured brown" on the plan indorsed on the deed of May 7, 1897. Rowell, so far as appeared, did not know of the release of the right of way in the deed of May 25, 1907, and Mrs. Moore had no notice of the release. After the conveyance of March 25, 1910, the defendants Mr. and Mrs. Moore claimed to exercise the right of way over the above-mentioned paths on the plaintiff's land, and in September, 1911, they opened the window in Willow Cottage overlooking the plaintiff's land and the door which had been blocked up as above mentioned in 1907.

The plaintiff brought this action in the county court against Mr. and Mrs. Moore and Rowell, claiming as against Mr. and Mrs. Moore a declaration that they and each of them or other the owners or occupiers for the time being of Willow Cottage were not entitled

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to any right of way over the plaintiff's land, nor any easement of light over the plaintiff's land for the window; an injunction to restrain them from trespassing on the plaintiff's land; and damages for trespass; and in the alternative, if the right of way was still subsisting, damages as against Rowell for breach of covenant for title and quiet enjoyment.

The county court judge held that the defendants Mr. and Mrs. Moore were not entitled to the right of way, and that the right to light through the window had been definitely abandoned. He accordingly gave judgment for the plaintiff as against Mr. and Mrs. Moore, and for the defendant Rowell, with costs; and he ordered that the plaintiff should add Rowell's costs to his own costs as against the Moores, and that the Moores should pay both those sets of costs. The defendants Mr. and Mrs. Moore appealed.

In the Divisional Court Bray J. held, first, that Mrs. Williams had not by the deed of May 25, 1907, when the legal estate in the dominant tenement was in the mortgagees, effectually released or extinguished the right of way, and that when the legal estate in the land was reconveyed by the mortgagees to Rowell the right of way remained appurtenant to the land and passed to Rowell and from him to the defendant Mrs. Moore. Secondly, with regard to the question of estoppel by recital, he said that no authority had been cited where the doctrine of estoppel by recital had been applied except in the case of an estate in land, and none where it had been applied in the case of an easement. Assuming, however, that it was applicable to a right of way, the cases showed that a statement that a person "is entitled" was a general and not a particular statement, and it did not become a particular statement by the reference to the deed of May 7, 1897. There was not in the recital a precise, clear, and unambiguous statement that Mrs. Williams was seised in fee simple of the land to which the right of way was appurtenant, and he could find no real distinction between the case of *Onward Building Society* v. *Smithson* (1) and the present case. He held, therefore, that the recital in the deed of May 25, 1907, was not sufficiently clear and unambiguous to estop Mrs. Williams and all those claiming under her from

(1) [1893] 1 Ch. 1.

denying that the right of way had been released. In his opinion, therefore, the defendants were entitled to judgment both as to the right of way and as to the window.

Lush J. held that the release by Mrs. Williams of the right of way in the deed of May 25, 1907, operated so as to extinguish the right of way against every one except the mortgagees and those claiming under them; and that when the mortgagees conveyed the legal estate in the dominant tenement to Rowell, who was her legal representative, the right of way became absolutely extinguished. He further held that the recital in the deed of May 25, 1907, was sufficiently clear and precise to estop Mrs. Williams and those claiming under her from denying that the right of way was extinguished. The judgment of the county court judge upon this point and also as to the window was therefore right.

Both the learned judges agreed that the county court judge was wrong in ordering the defendants Mr. and Mrs. Moore to pay to the plaintiff the costs which he had to pay to Rowell. The case is reported upon this last-mentioned point in [1913] W. N. 349.

As the learned judges differed upon the main point, Lush J., as the junior judge, withdrew his judgment, and the appeal was accordingly allowed.

Subsequently an application was made to the Court to reconsider the question of the power of the junior judge to withdraw his judgment in such a case, and the Court held that the junior judge had a discretion to withdraw his judgment. The case is noted upon this point in [1913] W. N. 360.

The plaintiff by leave appealed. Upon the appeal neither the above-mentioned question of costs nor the question of the junior judge withdrawing his judgment was argued.

Hon. W. H. Cozens-Hardy, K.C., and *W. A. Greene*, for the plaintiff. An easement can be released or abandoned without any particular formality. It is a question of intention to be decided upon the facts of each particular case: *Crossley* v. *Lightowler* (1); *Reg.* v. *Chorley* (2); *Cook* v. *Mayor, &c., of Bath.* (3)

(1) (1867) L. R. 2 Ch. 478, at p. 482. (2) (1848) 12 Q. B. 515, at p. 519.
(3) (1868) L. R. 6 Eq. 177, at p. 179.

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By the deed of May 25, 1907, Mrs. Williams effectually released the right of way which was vested in her as the owner and occupier of the dominant tenement. She thereby showed her intention to abandon it. If there had been no mortgage the release would have been complete. The legal estate in the dominant tenement was then outstanding in the mortgagees, and therefore the release could not affect their rights. But when once the mortgagees had reconveyed the legal estate to Mrs. Williams' legal personal representative the release became absolute and the right of way was gone. The right of the mortgagees to exercise the right of way ceased when the mortgage was paid off and the reconveyance was executed. If not, it must follow that, if the mortgagees had reconveyed to Mrs. Williams during her lifetime, she could have asserted the right of way. The release was an absolute release of the right of way, subject to the rights of the mortgagees, and when their rights ceased the right of way was completely gone. There was here the intention to abandon and the actual abandonment of the right of way.

Secondly, the recital in the deed of May 25, 1907, under which Mr. Williams conveyed the eastern land to the plaintiff, created an estoppel, and when the mortgaged premises were reconveyed to the legal personal representative of Mrs. Williams the interest so conveyed fed the estoppel. Bray J. seemed to think that the doctrine of estoppel did not apply to an easement. In Co. Litt., 352a, it is said that "it is called an estoppel or conclusion, because a man's owne act or acceptance stoppeth or closeth up his mouth to alleage or plead the truth." That description of estoppel does not limit it as Bray J. thought. The recital here is sufficiently precise and unambiguous to operate as an estoppel. The law is clear that the recital must be precise and certain: *Right* v. *Bucknell.* (1) In that case a recital in a deed of conveyance that the grantor was "legally or equitably entitled" to the land was held not to create an estoppel. There cannot be a legal and equitable estate in an easement. A person is entitled to an easement or he is not. In *Heath* v. *Crealock* (2) the recital, as Lord Cairns L.C. said (at p. 30), was "not precise or unambiguous," and it was a recital "which, in substance, amounts

(1) (1831) 2 B. & Ad. 278. (2) (1874) L. R. 10 Ch. 22.

to a statement that he had an estate either at law or in equity," and the fact that it stated that the estate was free from incumbrances created no estoppel for the purpose of making the legal estate pass. In *General Finance Co.* v. *Liberator Building Society* (1) there was no recital, and Sir George Jessel said (at pp. 23, 24) that he was not prepared to say that a covenant would do, and that no case had been produced in which it was held that a covenant that a man had a thing was considered as equivalent to a positive statement that he had it. Again in *Onward Building Society* v. *Smithson* (2) the recitals in the deed were strictly true. There was no averment that the vendors were seised in fee. As Bowen L.J. said in that case (3), "estoppel can only be by what is clear and precise"; or, as the same learned judge said in *Low* v. *Bouverie* (4), "an estoppel, that is to say, the language upon which the estoppel is founded, must be precise and unambiguous," and he goes on to explain that by saying that "that does not necessarily mean that the language must be such that it cannot possibly be open to different constructions, but that it must be such as will be reasonably understood in a particular sense by the person to whom it is addressed." There is a sufficiently precise and unambiguous statement in the recital in the deed of May 25, 1907. The recital is that the plaintiff "is entitled" to the right of way. A recital can say no more in the case of an easement, in which there is no legal or equitable estate.

The last question relates to the window. There was an abandonment by the mortgagor of the right to light for the window. There was an agreement for value that the window should be blocked up and it was in fact blocked up. There was the intention to abandon and the actual abandonment of the right to light. The principle applicable to the right of way applies to the easement of light.

E. Morten, K.C., and *S. L. Porter*, for the defendants Mr. and Mrs. Moore. When Mrs. Williams by the deed of May 25, 1907, purported to release the right of way over the eastern land, she was only entitled to the equity of redemption in the western land

(1) (1878) 10 Ch. D. 15.
(2) [1893] 1 Ch. 1.
(3) Ibid. at p. 14.
(4) [1891] 3 Ch. 82, at p. 106.

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and house, the dominant tenement, the legal estate being in the mortgagees together with the right of way as appurtenant to the dominant tenement. She could not therefore release the right of way absolutely. The right was not a right in gross, but a right appurtenant to land. She was only entitled, and she only purported, to release the right which she had as mortgagor in possession of the dominant tenement to exercise the right of way so long as she remained in possession. To extinguish an easement there must be a release either express or implied from abandonment: Goddard on Easements, 7th ed., p. 562; Gale on Easements, 8th ed., pp. 556, 557. After the deed of May 25, 1907, the right of way remained appurtenant to the dominant tenement, and when the mortgage was paid off and the western land and house were conveyed to Rowell the right of way still subsisted as appurtenant thereto. If Mrs. Williams had been alive when the mortgage was paid off, the land and house would have been reconveyed to her and the right of way would have remained appurtenant thereto. The case comes within the decision in *General Finance Co.* v. *Liberator Building Society.* (1) There a person mortgaged land to the plaintiffs at a time when he had no interest therein. Subsequently he acquired the legal estate and mortgaged the land to the defendants, who had no notice of the prior mortgage. It was held that the defendants were entitled to the land in priority to the plaintiffs. The release therefore did not extinguish the right of way, and the right passed to Mrs. Moore under the conveyance of March 25, 1910. The question as to the extinguishment of the right to light depends upon the same considerations as apply to the release of the right of way.

Next, there is no estoppel by recital in the deed of May 25, 1907. To create an estoppel the recital must be precise and unambiguous. It must recite that the releasor is seised in fee simple of the dominant tenement. The recital must make it clear that the parties are dealing with a right of way appurtenant to land, and it must state the estate of the releasor in the land. The form of a grant of a right of way in connection with a dwelling-house in the Encyclopædia of Forms and Precedents,

(1) 10 Ch. D. 15.

vol. v., p. 506, gives a recital stating that the grantee is seised in fee simple of the dominant tenement. That shows the form of recital necessary to create an estoppel. The only recital here is that under and by virtue of a certain indenture Mrs. Williams "is entitled to" the right of way. It does not say that she was seised in fee simple of the dominant tenement. The word "entitled" does not necessarily mean absolutely entitled. It is not sufficiently precise to create an estoppel: *Heath* v. *Crealock* (1); *General Finance Co.* v. *Liberator Building Society* (2); *Onward Building Society* v. *Smithson.* (3) As Jessel M.R. said in *General Finance Co.* v. *Liberator Building Society* (4), this kind of estoppel, by which falsehood is made to have the effect of truth, ought not to be carried further than a judge is obliged by the authorities to carry it. This kind of estoppel is not founded on representation binding only the person making it, and therefore the observations of judges in such cases as *Low* v. *Bouverie* (5) are not in point. The estoppel runs with the land so as to give a good title to a purchaser for value without notice. The recital, in order to create an estoppel, must be one which can only be construed in one way. The words of the recital here are consistent with Mrs. Williams having at the date of the deed of May 25, 1907, a title under the indenture of May 7, 1897, subject to the rights of the mortgagees. It does not say that she has the full title conferred by that indenture. It would cover the case of the title of a mortgagor in possession. It refers to the deed as the root of her title. The further words in the recital are all consistent with the title being that of a mortgagor in possession. The recital cannot be assisted by the subsequent release. A grant or release cannot be looked at to cure an ambiguity in the recital. There is therefore no estoppel by recital.

Hon. W. H. Cozens-Hardy, K.C., in reply.

Buckley L.J. This is an action brought in the county court in which the plaintiff claimed a declaration that the defendants were not entitled to a certain right of way over the plaintiff's

(1) L. R. 10 Ch. 22.
(2) 10 Ch. D. 15.
(3) [1893] 1 Ch. 1.
(4) 10 Ch. D. at pp. 24, 25.
(5) [1891] 3 Ch. 82.

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land or to a right to light over the plaintiff's land for a certain window. The county court judge decided in favour of the plaintiff. On appeal to the Divisional Court the two learned judges differed. Bray J. was in favour of the defendants; Lush J. was in favour of the plaintiff. Lush J. withdrew his judgment, and the result was that the judgment of Bray J. prevailed, and the order of the county court judge was discharged, and judgment entered for the defendants. The plaintiff appeals to this Court.

The case arises in this way. In 1897 Mr. Williams was the owner in fee simple of two plots of land. The westernmost of those two plots, which I will call the western land, had a house, called Willow Cottage, upon it. The other plot to the east I will call the eastern land. The eastern wall of the cottage stood next the boundary line dividing the two plots, and it had a window which looked over the eastern plot. By a deed dated May 7, 1897, Mr. Williams conveyed to his wife in fee simple the cottage and the western land, and by the same deed he granted to her "a right of way at all times and for all purposes for the said Ann Williams her heirs and assigns owners or occupiers for the time being of the premises hereinbefore described over and across" certain paths on the eastern land. The result so far was that Mr. Williams remained the owner of the eastern land and Mrs. Williams became the owner of Willow Cottage and the western land, with a right of way appurtenant thereto over the eastern land. On the next day, May 8, 1897, Mrs. Williams executed a mortgage of Willow Cottage and the western land to certain mortgagees as security for an advance "together with a right of way at all times and for all purposes for the mortgagees, their heirs and assigns, owners or occupiers for the time being of the premises hereinbefore described over and across" the paths on the eastern land. Matters stood thus until 1907, when on May 25 of that year Mr. and Mrs. Williams executed a deed whereby the eastern land was conveyed to the plaintiff. The deed was divided into two parts. In the first part the husband conveyed the eastern land to the plaintiff in fee simple. The second part commenced with a new recital, and in the operative part the wife released the right of way, which was reserved to her by the deed of May 7, 1897, over the land conveyed. The

last mentioned recital and release are all-important in this case. [His Lordship read them.] Under that deed the plaintiff acquired the eastern land together with a release of the right of way. This release was executed without the concurrence of the mortgagees. On December 10, 1907, Mrs. Williams died, having appointed her husband executor of her will. On November 18, 1909, the husband died, and by his will he appointed Rowell his executor and trustee, and thus Rowell became Mrs. Williams' legal personal representative. On March 10, 1910, the mortgage was paid off, and the mortgagees reconveyed the western land to Rowell in fee simple, to hold upon the trusts of the will of Mr. Williams. Therefore on that date Mrs. Williams' legal personal representative became entitled to the western land free from incumbrances. In that state of matters Rowell, not knowing, I presume, of the deed executed by Mrs. Williams releasing the right of way, executed a conveyance on March 25, 1910, to the defendant Mrs. Moore in fee simple of Willow Cottage and the western land "together with a right of way at all times and for all purposes for the said Eliza Jane Moore her heirs and assigns owners or occupiers for the time being of the premises hereinbefore described over and across the paths coloured brown on the said plan"—that is, over and across the eastern land.

The question is whether the plaintiff is entitled to say that the eastern land is freed from the right of way, or whether the defendant Mrs. Moore is right in saying that Rowell had power to grant the right of way to her.

Two points have been argued which I propose to take separately. It is said in the first place that during the continuance of the mortgage two alternative rights existed. Mrs. Williams had a right, so long as she remained in possession of the mortgaged premises, to exercise her right of way over the eastern land. The mortgagees had a right, if they took possession of the mortgaged premises, to exercise the right of way. The result, it is said, is that when Mrs. Williams released the right of way on the conveyance of the eastern land to the plaintiff she merely released all that she had power to release, but not that which she had no power to release, namely, the right of the mortgagees to take possession of the western land and exercise the right of

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way, and that upon the reconveyance by the mortgagees of the western land the right of way remained appurtenant thereto. That is the argument. No doubt if the mortgagees had gone into possession the plaintiff would have had no answer to their claim to the right of way. The right, however, which existed in the mortgagees was a right separate from and independent of that which existed in the mortgagor. It is not as if on the reconveyance to Rowell there passed to him as the representative of Mrs. Williams the right which the mortgagees had. The reconveyance passed nothing so far as related to their right to exercise the right of way. When the reconveyance was executed in 1910 the right of the mortgagees disappeared, and there is now no one who can say that he has the right which they had to take possession of the western land and exercise the right of way. The other right which the mortgagor had she purported to release in its entirety in favour of the plaintiff. The result is that by the deed of May 25, 1907, the plaintiff acquired a perfect release of the right of way subject to the mortgagees' rights which have since disappeared. So far as the right of way is concerned that is sufficient to dispose of the case.

Another point has been elaborately argued before us, and therefore I will express my opinion upon it. The deed of May 25, 1907, contained a recital, and the question is whether that recital is so precise, so unambiguous, and so exact as that within the authorities to which reference has been made it creates an estoppel by reason of which it must be taken to be the fact, though it was not the fact, that on May 25, 1907, Mrs. Williams was the sole and undisputed owner of the right of way, in other words, that there was no right in the mortgagees such as I have described above. The answer to this question depends upon the language of the recital. When the deed was executed there were in existence the rights which I have mentioned—one a right in the mortgagor and the other a right in the mortgagees. Does the recital amount to a statement of fact that there is not a mortgage? That is the question. "Whereas under and by virtue of a certain indenture of conveyance dated the 7th day of May, 1897, and made between the said Cornelius Williams of

the one part and the said Ann Williams of the other part"—so far I am told that I have to read a certain deed, and I am next told that under and by virtue of that deed a certain right has been created—"the said Ann Williams is entitled to a right of way at all times and for all purposes for the said Ann Williams her heirs and assigns owners and occupiers of Willow Cottage aforesaid over and across certain paths coloured brown on the plan indorsed on the said indenture." The material words there are that Mrs. Williams "is entitled" to the right of way. It is a recital that a state of facts exists at that moment under which she is entitled to the right of way. It seems to me to mean that the deed of May 7, 1897, granted to her a certain title, and that she has that title still. The fact is that she had a title under that deed, but the title was qualified by the mortgage deed of May 8, 1897. The recital affirms that she has that title still unaffected by any subsequent deed. I agree that it is possible to read the recital in another way. It is said that the word "entitled" is ambiguous, and that therefore the recital is not so plain and unambiguous as to exclude the right of the mortgagees to take possession of the mortgaged premises and to exercise the right of way. I do not know what other word could have been used in regard to a right of way. A person is either entitled or he is not. It cannot be said that a person has a legal or equitable estate in a right of way. "Entitled" is the proper expression. It seems to me that the recital is clear. If I look further on I find something which assists that construction. I see that it is recited that it has been agreed that Mrs. Williams shall join in the deed for the purpose of releasing the right of way; and in the operative part she released the land conveyed "from all rights of road reserved to her by the said indenture of May 7, 1897." As matter of construction I read those words as meaning all rights of way as granted to her by that deed and as not altered. I am entitled to refer to that for the purpose of construing the recital. Therefore there is a precise and unambiguous statement of fact in the recital in the deed of May 25, 1907, which acts as an estoppel against the defendant Mrs. Moore, who claims through Ann Williams.

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There remains the question as to the window. When the plaintiff in March, 1907, was going to buy the eastern land, the window in Willow Cottage overlooking the land was by agreement with Mrs. Williams blocked up some days before the conveyance was executed, the plaintiff doing the work and paying the expense. The mortgagees could have taken possession of Willow Cottage and reopened the window, but when the mortgage was paid off and the reconveyance executed by the mortgagees to Mrs. Williams' legal personal representative all rights which the mortgagees had disappeared. There only then remained the rights of Mrs. Williams, and she had agreed with the plaintiff for good consideration that the window should be blocked up. This point follows the decision on the first point.

The appeal must be allowed.

PHILLIMORE L.J. I agree. I think that by the deed of May 25, 1907, the right of way granted to Mrs. Williams by the deed of May 7, 1897, was released subject to certain contingencies, and when on March 14, 1910, there was a reconveyance of the mortgaged premises the contingencies determined and the right of way became wholly abandoned or extinguished. Suppose that when Mrs. Williams by the deed of May 25, 1907, purported to release the right of way she had not mortgaged Willow Cottage in fee, but had created an ordinary lease, or a mortgage by demise, or a term to secure an annuity, with the right of way, she could not during the continuance of the demise or the term have wholly and effectually released the land from the right of way so granted, but the moment the term expired or the annuitant died the right of way would have become wholly extinguished by the release in the deed of May 25, 1907. So here the right of way became wholly extinguished when the rights of the mortgagees ceased on the reconveyance of the mortgaged premises on March 14, 1910. This covers the case of the window as well as the right of way.

With regard to the question of estoppel by recital in a deed, it is truly said that the law of estoppel in the case of real property is different from the law of estoppel as between persons. It is the law which operates when a grantee of land has had a conveyance of the whole interest in the land from a grantor who himself at

the time had only a partial interest in the land. The former then has a right, when the grantor gets the entire interest in the land, to say as against all the world that that interest has passed to him. It does not then depend upon the mere representation by the grantor that he had the whole interest. The estate feeds the estoppel, and therefore ceases to be an estate by estoppel only and becomes an interest: *Doe* v. *Oliver*. (1) In that case, which was the case of a contingent remainder, and the cases there cited there was an estoppel by fine, which was tortious, and the reason why one has to go to the later cases is because a grant is not tortious, and in the later cases one looks at the recitals. In applying the law of estoppel to a recital in a deed there must be a precise recital by the grantor that he has that which in fact he has not, but which he purports to grant. The question of an innocent purchaser does not come into the consideration; the question is who has first acquired the title. Whoever has first acquired the title succeeds; the whole grant has passed to him. Here the recital is precise. The word "entitled" is the apt word to describe a complete title to the right of way, and means what it says without qualification, and the verb "is" is an apt word to state that the title remains in the releasor. I agree with what Buckley L.J. has said upon this.

I wish to add one other observation. Lush J., with whose views on the main questions I agree, withdrew his judgment and thereby allowed the judgment of the county court judge to be reversed by a single judge. I do not express any decided opinion upon the matter, but I must express my doubt as to whether he was right in so doing. The analogy of mandamus was referred to in the Court below, but it does not follow that the practice on an application for the prerogative writ of mandamus applies to an appeal from a county court. Even, however, if we apply the practice in mandamus there would seem to be no such rule as that suggested. In *Reg.* v. *Archbishop of Canterbury* (2) the judges of the Court of Queen's Bench were equally divided, two being in favour of making the rule for a mandamus absolute and two for discharging it, and in consequence no order was made. There was no suggestion in

(1) (1829) 5 Man. & Ry. 202; 2 Sm. L. C., 11th ed., p. 724.
(2) (1848) 11 Q. B. 483.

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that case that the junior judge should withdraw his judgment. Again, in *Reg.* v. *Bishop of London* (1), Hawkins J. and Stephen J. differed as to whether the rule for a mandamus should be granted, Hawkins J. being for discharging the rule and Stephen J. being for making it absolute. The rule was therefore discharged, but I happen to remember that, upon it being suggested that Stephen J. should withdraw his judgment, that learned judge refused with considerable emphasis.

PICKFORD L.J. I agree that the appeal should be allowed. After the mortgage had been paid off and the mortgaged premises had been reconveyed to the legal personal representative of the mortgagor the right of the mortgagees to the right of way no longer existed. Upon this first point I have nothing to add.

With regard to the question of estoppel, that does not call for a decision, because in my opinion the appeal succeeds on the first point. I regret, however, that I cannot take the same view of this question as the other members of the Court. As it is not necessary for my decision, I do not go into it at length. Assuming that the doctrine of estoppel raised here can apply to a case of this kind, I am not satisfied that the statement in this recital is so precise as to operate as an estoppel. I content myself with saying that I agree with Bray J. upon this point.

Appeal allowed.

Solicitors for plaintiff: *Willis & Willis, for A. Lionel Lane, Gloucester.*

Solicitor for defendants: *C. T. Courtney Lewis, for Langley-Smith & Son, Gloucester.*

(1) [1891] 2 Q. B. 48.

W. F. B.

[IN THE COURT OF APPEAL.]

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Oct. 27, 31; *Nov.* 2.

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Public Authorities' Protection—Limitation of Time for bringing Action—Action for Damages—Statutory Duty or Authority—Voluntary Contract—Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

By a private Act of Parliament the defendants, a municipal corporation, were empowered to make and supply gas, and to sell, manufacture, store, and dispose of coke, the product of the coal employed in the manufacture of the gas. The defendants contracted to sell and deliver to the plaintiff a ton of this coke. Injury was done to the plaintiff's premises by the negligence of the defendants' servant while engaged in delivering the coke. An action by the plaintiff against the defendants to recover damages was commenced more than six months after the date of the act complained of:—

Held, that although the defendants' authority to sell coke was statutory, the act complained of was done in the execution of a voluntary contract with the plaintiff, and not of any public duty or authority; and therefore s. 1 of the Public Authorities Protection Act, 1893, afforded no defence to the action.

Lyles v. *Southend-on-Sea Corporation* [1905] 2 K. B. 1 applied.

Sharpington v. *Fulham Guardians* [1904] 2 Ch. 449 approved.

Appeal from a decision of a Divisional Court (Bray and Lush JJ.) dismissing an appeal from the county court of Yorkshire holden at Bradford.

The plaintiff was a motor car manufacturer and carriage builder; he had a shop at 52, Manningham Lane, Bradford. He bought a ton of coke from the defendant corporation. While the coke was being delivered by the defendants' servant at the plaintiff's premises on October 10, 1912, some of the coke was precipitated through a window of the plaintiff's shop. On May 7, 1913, this action was commenced in the county court. The particulars of claim indorsed on the plaint note were as follows: "Oct. 10, 1912. To damages sustained by the plaintiff by reason of the negligence of the defendants, their servants or agents, in delivering a load of coke at the plaintiff's premises, No. 52, Manningham Lane, Bradford, on October 10, 1912, whereby part of the coke was precipitated through a large plate-glass window." Then followed particulars of the damages.

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The defendants gave notice of a statutory defence, namely, that they relied on s. 1 of the Public Authorities Protection Act, 1893 (1), as the action was commenced more than six months after the act complained of.

By the Bradford Corporation Gas and Improvement Act, 1871 (34 & 35 Vict. c. xciv.), the defendant corporation were authorized to acquire the undertaking of the Bradford Gaslight Company, which had previously carried on the business of supplying Bradford with gas. By s. 17 of the Act of 1871 it was provided that: "From and after the execution of the conveyance by the company all the statutory and other rights, powers, privileges and authorities by or under any Act conferred on, given to, or vested in the company, so far as the same can be applicable to a municipal corporation, and subject to all the statutory and other obligations, restrictions and duties by or under any Act imposed or incumbent on the company, so far as the same can be applicable to a municipal corporation and are not inconsistent with this Act, shall apply to and be vested in the corporation, and may be used, exercised, and enjoyed by the council for and on behalf of the corporation, and the officers, agents, and servants respectively of the council accordingly, and the common seal of the corporation may be used when necessary in reference thereto in like manner as if the corporation had been originally named in and authorised to execute every such act; and the corporation and their officers and servants shall be entitled to all the privileges conferred on the company, and their officers and servants, by any Act relating to the company, as

(1) Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1: "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect:

"(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof: . . . ."

fully and effectually as if the corporation and their officers and servants had been therein named."

Sect. 20. "The corporation may make, store, and supply gas within the borough and within any place within the limits for supply of gas by the company, and may sell, manufacture, store and dispose of coke . . . . and other matters the products of the coal or other materials employed in the manufacture of such gas . . . . : Provided always, that the corporation shall not make or store gas, or manufacture or store the residual products of gas, on any lands other than the lands belonging or reputed to belong to the company . . . ."

The action was tried with a jury who returned a verdict for the plaintiff, but the county court judge entered judgment for the defendant corporation on the ground that the Public Authorities Protection Act, 1893, applied.

The plaintiff appealed to the Divisional Court. The judges differed. Lush J. was of opinion that the action was brought on a contract entered into by the corporation, acting within their statutory powers, with a particular individual, the plaintiff, by which they undertook certain obligations towards the plaintiff, including that of not being negligent in the delivery of the coke, and that the negligent act of the defendants' servant while discharging the contractual obligations of the defendants towards the plaintiff was not an act directly done by the defendants in pursuance or execution of an Act of Parliament or any public duty or authority, and that the Act of 1893 therefore did not apply to the case.

Bray J. was of opinion that the action was based on a tort committed in the execution of powers which the defendants were authorized by statute to exercise, and that the decision of the county court judge was therefore right.

The appeal was accordingly dismissed. The plaintiff appealed.

Scott Fox, K.C., and *Lowenthal*, for the plaintiff. The Public Authorities Protection Act, 1893, does not apply to this case. The act in respect of which the action was brought was not done in pursuance or execution of any Act of Parliament or of any public duty or authority. A public duty, for the purposes

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of the Act of 1893, arises where there is a statutory obligation to do something for the benefit of the public generally. A duty towards a particular individual arising out of a contract with that individual is not a public duty. The Bradford Corporation Gas and Improvement Act, 1871, does not impose any duty on the defendants to sell coke; it merely empowers them to do so. But even if in the due performance of the work of the gas undertaking it was their duty in the interests of the ratepayers to dispose of the coke and other residual products by sale, there was no statutory duty on them to sell coke to the plaintiff. The act which the defendants were intending to do, namely, to deliver coke on the plaintiff's premises, was therefore not one which they could justify under their statutory authority. It is immaterial to consider whether the action is one of tort or contract. The plaintiff could as a matter of fact have sued either in contract or tort. The question does not depend on the nature of the cause of action but on the nature of the act done by the defendants: *Pearson & Son* v. *Dublin Corporation.* (1) The importance of the fact that the defendants entered into a contract with the plaintiff is that the damage sustained was due to that contract. But for the contract there would have been no delivery of coke on the plaintiff's premises, and the plaintiff therefore ran a greater risk than other members of the public of injury from negligence in the delivery. An examination of the authorities shows that the Act does not apply to cases where the conduct giving rise to the action occurred in the performance of a contract entered into by the defendants, even though the defendants would not in the absence of statutory authority have been able to enter into a contract: *Palmer* v. *Grand Junction Ry. Co.* (2); *Carpue* v. *London and Brighton Ry. Co.* (3); *Sharpington* v. *Fulham Guardians.* (4) There is one possible exception to this proposition, namely, where the contract was a contract to perform towards the plaintiff a duty which the defendants owed to him, apart from contract, as a member of the public: *Parker* v. *London County Council* (5); *Lyles* v. *Southend-on-*

(1) [1907] A. C. 351.
(2) (1839) 4 M. & W. 749.
(3) (1844) 5 Q. B. 747.
(4) [1904] 2 Ch. 449.
(5) [1904] 2 K. B. 501.

Sea Corporation. (1) It is doubtful whether in those cases there really was a contract in the strict sense of the word, but subject to this possible exception, there is no case to be found in which an act done in the performance of a contract voluntarily made in pursuance of a statutory authority or public duty has been held to be within the Act. All the cases in which the Act has applied have been cases where there was no contract: *Midland Ry. Co.* v. *Withington Local Board* (2); *Edwards* v. *Vestry of St. Mary, Islington* (3); *Chamberlain & Hookham* v. *Bradford Corporation.* (4) [They also referred to *National Telephone Co.* v. *Kingston-upon-Hull Corporation* (5); *Fielding* v. *Morley Corporation* (6); and *Ambler* v. *Bradford Corporation.* (7)

McCall, K.C., and *Mason*, for the defendants. The defendants' obligations with regard to the manufacture and supply of gas and the disposal of the residual products are wholly statutory. The Gasworks Clauses Act (1847) Amendment Act, 1871 (34 & 35 Vict. c. 41), which was incorporated with the defendants' Act of 1871 by a subsequent private Act, makes it obligatory on the defendants to supply gas. They are also bound to sell the coke and other residual products, for they can dispose of them in no other way. The only way in which they can sell coke is by a contract of sale made with some individual purchaser. The fact that the defendants entered into a contract with the plaintiff does not prevent the delivery of the coke from being an act done in pursuance or execution of the defendants' statutory duty. The action is founded directly on a neglect or default in the execution of a public duty, and the fact that as a matter of pleading the plaintiff's case might be stated either as one founded on contract or as one founded on tort does not show that s. 1 of the Act does not apply: *Lyles* v. *Southend-on-Sea Corporation*, per Romer L.J. (8) The action is in fact founded on tort; there is no reference to any contract in the particulars. The action in substance is an action for a breach of the defendants' common

(1) [1905] 2 K. B. 1.
(2) (1883) 11 Q. B. D. 788.
(3) (1889) 22 Q. B. D. 338.
(4) (1900) 83 L. T. 518.
(5) (1903) 89 L. T. 291.
(6) [1899] 1 Ch. 1.
(7) [1902] 2 Ch. 585.
(8) [1905] 2 K. B. at p. 20.

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law duty owed to all the public to take reasonable care when delivering coke in the highway.

Scott Fox, K.C., in reply. There is no evidence that the defendants could not dispose of their coke by other means than by selling it.

BUCKLEY L.J. In this case the plaintiff sued the Corporation of Bradford in the county court for damages sustained by him by reason of the negligence of the defendants, their servants or agents, in delivering a load of coke on the plaintiff's premises, whereby a part of the coke was precipitated through a large plate-glass window. The county court judge gave judgment for the defendants on the ground that the Public Authorities Protection Act applied to the case and that the action had not been commenced within the limit of time required by that Act. The plaintiff appealed to the Divisional Court. The learned judges in that Court differed in opinion, Bray J. thinking that the Act did apply, and Lush J. thinking that it did not. The judgment of the learned county court judge therefore was affirmed, and from that decision of the Divisional Court the matter was brought to this Court.

The material facts are as follows: The Bradford Corporation, having the powers which I will state in a moment, sold a ton of coke to the plaintiff. They sent a cart to deliver the coke. The driver of the cart backed the cart on to the pavement over the coal shoot in the pavement where the coke was to be received, and tipped up the cart so negligently that the coke was precipitated into the plaintiff's window and broke it. The action was brought to recover damages for the injury thus done.

The powers of the Bradford Corporation with regard to the sale of coke arose in this way. Down to the year 1871 a company called the Bradford Gaslight Company, under certain statutory powers, carried on the business of supplying Bradford with gas, but in 1871 an Act was passed, called the Bradford Corporation Gas and Improvement Act, 1871, and that Act, after recitals as to the existence of the previous Bradford Gaslight Company, contained provisions under which the corporation were to acquire all the undertaking of the Bradford Gaslight Company. [The

Lord Justice read ss. 17 and 20 of the Act and continued:] Therefore, under that Act, and the Acts incorporated with it, there was an obligation on the corporation to supply gas to Bradford. They were to have the authority and to be under the obligations which previously lay upon the Gaslight Company, and they had authority or power given by s. 20 to make and store and dispose of coke.

Under those circumstances, the question for investigation is this: Were the corporation, in negligently delivering coke upon the plaintiff's premises, doing an act in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, and did they commit any act of neglect or default in the execution of any such Act? Before considering the authorities, I wish to say what strikes me upon that language as applied to this particular case. Under their Act of Parliament the corporation have power to make and sell coke; and it is said, and I will accede to the suggestion, that it was their duty to sell coke for the purpose of carrying on their undertaking more beneficially in the interests of the ratepayers. In that sense there was a duty on the corporation to sell coke, but when they entered into a contract with the plaintiff to sell him a ton of coke, did they do that in execution of any Act of Parliament, or of any public duty or authority? What Act of Parliament was there which compelled them, or rendered it their duty, to sell to the plaintiff a ton of coke, or to sell this ton of coke to him as distinguished from selling this ton of coke, or any other tons of coke which they had for sale, to any other person so as to benefit the ratepayers? It appears to me that there was no duty towards this particular plaintiff in the matter. There was a public duty to sell the coke for the benefit of the ratepayers, but there was no public duty at all between the corporation and the plaintiff in the matter of this sale. Therefore, in the absence of authority, I should myself have answered the question by saying that, when the defendants were doing the act of delivering the ton of coke which they had sold to the plaintiff, they were not delivering it in pursuance or execution of any Act of Parliament or of any public duty or authority.

The matter is by no means free from authority, but before

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considering the authorities I desire to make this one general observation. I know of no case in which the Public Authorities Protection Act has been held to apply where a voluntary contract has been entered into under a statutory authority. There are cases—I will mention them in a moment—where there was no contract at all. There are also cases in which in a sense there might be said to be a contract to perform a statutory duty. I will show what I mean by an illustration. If a corporation are working a tramway, it is their duty to admit as a passenger into their tramcars any person who presents himself and tenders his fare. It may be said that the admission of the passenger and the payment of the fare create a contract between the corporation and the passenger. It appears to me that, speaking strictly, that is not true. A contract is an obligation entered into when it is in the volition of both parties to the contract to enter into it or not as they please, but in the case I am putting there is no volition on the part of the corporation to make a contract with the intending passenger; they are bound to make the contract with him if he chooses to make it with them. There have been cases of that kind under the Act of 1893, and I will refer to them presently, but there is no case in which the Act has been held to apply where it was at the option of the public authority, seeking the protection of the Act, either to make or to refuse to make a particular contract.

Palmer v. *Grand Junction Ry. Co.* (1) is an example of a case where the question turned on a voluntary contract. That case arose under a special Act which contained a clause similar to s. 1 of the Act of 1893. The facts were that certain horses were received for carriage by the railway company. An action was brought against the company, as owners and proprietors of the railway, for not safely carrying and conveying the horses in their carriages on the railway, whereby one horse was killed and another was injured. It was held that the defendant company's statutory authority was an authority which enabled them to carry horses if they thought proper, but when they entered into the contract with the plaintiff they were

(1) 4 M. & W. 749.

entering into a voluntary contract, and the provisions of the special Act which entitled them to notice of action therefore did not apply. The decision in *Carpue* v. *London and Brighton Ry. Co.* (1) was to a similar effect. Those were cases in which, there being a voluntary contract, the provisions of such an Act of Parliament as this were held not to apply. There are three cases in which there was no contract. The first is *Midland Ry. Co.* v. *Withington Local Board.* (2) In that case the question arose with regard to paving and sewering work under the Public Health Act, 1875. It was held that the Act applied: but Lord Esher M.R. said (3): "I think that where an action has been brought for something done or omitted to be done under an express contract, the section does not apply; according to the cases cited an enactment of this kind does not apply to specific contracts." Another example of that class of case is *Edwards* v. *Vestry of St. Mary, Islington.* (4) In that case the vestry of St. Mary, Islington, had supplied a cart with a defective axle for the purpose of watering the streets; the plaintiff was driving the cart when the axle broke, and he was injured. There was no contract between the plaintiff and the defendants. The Act was held to apply because the corporation in the course of the performance of their statutory duty had had the misfortune to injure the man. The next case is *Chamberlain & Hookham* v. *Bradford Corporation* (5), which was an action for infringement of a patent, and therefore, of course, no question of contract arose. It was a case of a wrongful act done towards the owner of a monopoly, and it was held that the Act applied.

The next class are cases in which, in a sense, there may be said to have been a contract. *Parker* v. *London County Council* (6) was a case of a passenger in a tramcar. In such a case, as I have said, a contract may be said to arise from the payment and acceptance of the fare; but the carrying of the plaintiff as a passenger in the tramcar was an act done by the defendants not in pursuance of a voluntary contract but in performance of a

(1) 5 Q. B. 747.
(2) 11 Q. B. D. 788.
(3) 11 Q. B. D. at p. 794.
(4) 22 Q. B. D. 338.
(5) 83 L. T. 518.
(6) [1904] 2 K. B. 501.

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statutory duty. I notice that Channell J., who tried the case, would evidently have liked, if he could, to have decided that in cases of municipal trading such as this the Act of 1893 did not apply; it is, however, beyond question that, although the cause of action arises out of municipal trading, the Act may apply. *Lyles* v. *Southend-on-Sea Corporation* (1) was also a case in which the corporation were working a tramway. A passenger who was being carried on one of the defendants' cars was injured by a fracture of the conducting rod. He also was a person therefore who, in a sense, had made a contract with the defendant corporation, but it was held that the Act applied. Vaughan Williams L.J. in the course of his judgment said this, which appears to me is very relevant to the present case (2): "The protection of the Act, in my opinion, only applies to duties and acts which the person is under a statutory obligation to perform or do." Applying that to the present case, it appears to me that there was no statutory obligation on the Bradford Corporation to sell the plaintiff this ton of coke, or any coke. They relied on their statute as giving them authority to do it, but when they contracted with him to do it they superadded to their statutory duty that which they either might or might not, in their discretion, do, namely, they entered into a contract with him. Vaughan Williams L.J. went on to say: "In my judgment an act which is done, not only in pursuance or execution, or intended execution, of this Light Railways Order, but also in pursuance or execution, or intended execution, of some obligation incurred by a public authority voluntarily beyond the obligation cast upon them by the Order, is not an act done in pursuance or execution, or intended execution, of the Order." It is true that that may have been only a dictum, but in my opinion it is an accurate statement of the law. Where the case is one in which a statute is relied upon as showing the authority and obligation of the corporation to do the act in question, the Act applies; but when the corporation voluntarily elects to superadd to its statutory duty a contractual obligation towards a particular person, then the Act does not apply.

(1) [1905] 2 K. B. 1. (2) [1905] 2 K. B. at p. 13.

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In *Sharpington* v. *Fulham Guardians* (1) the defendants were under a statutory duty to provide a building for the reception of workhouse children. They entered into a contract with a builder to erect that building. The builder alleged that he had sustained loss by reason of negligence and frequent changes of plans on the part of the defendants in connection with the work. The action was brought to recover that loss. In giving judgment Farwell J., after referring to the statutory duty of the guardians to supply the house, said (2): "In order to carry out this duty they have power to build a house or alter a house, and they accordingly entered into a private contract. It is a breach of this private contract that is complained of in this action." To my mind, that is exactly applicable to the present case. The defendants, in the discharge of their statutory duty to sell their coke in a reasonable and proper manner, entered into a private contract with the plaintiff, and in my opinion the Public Authorities Protection Act does not apply to that contract. For these reasons I am of opinion that this appeal ought to be allowed.

PHILLIMORE L.J. I agree. A number of cases has been cited which have assisted us in the construction of this Act, and in some of which a limit has been placed upon the general words of the section. After the analysis of those cases which Buckley L.J. has given, I will only say that the cases which seem to me to have a useful bearing on the question in this case are the decision of the Court of Appeal, and especially the language of Lord Esher M.R., in the case of *Midland Ry. Co.* v. *Withington Local Board* (3), the decision of Farwell J. in *Sharpington* v. *Fulham Guardians* (1), the decision of the House of Lords in *Pearson & Son* v. *Dublin Corporation* (4), and lastly, and most important, the reasoning rather than the decision of all the judges of the Court of Appeal in the most recent case, *Lyles* v. *Southend-on-Sea Corporation.* (5) I think the reasoning of all the judges, and especially that of Vaughan Williams L.J., in that case covers

(1) [1904] 2 Ch. 449.
(2) [1904] 2 Ch. at p. 456.
(3) 11 Q. B. D. 788.
(4) [1907] A. C. 351.
(5) [1905] 2 K. B. 1.

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this case. There is one passage in his judgment which I referred to in the course of the argument, but I should like to refer to it again. He said (1): "In the first place, I doubt very much whether an act done by virtue of, and in compliance with, an express contract to do that act is done in pursuance or execution, or intended execution, of the Order, merely because the making of the contract itself only became intra vires by reason of the passing of the Order. Indeed there is express authority to the contrary," and he then cited the decision of Farwell J. to which I have already referred. I entirely agree with that view. Acts done or defaults made in the performance of a contract, which contract could only be made if it was intra vires of a public body, are not acts done or neglects or defaults in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, merely because one of the contracting parties derives its authority to contract either from an Act of Parliament, or from some principle of law applicable to corporations or public bodies or Ministers of State. The other party to a contract, made with a public body, is not to be prejudiced by the suggestion that the matter of which he complains was something done or omitted to be done in discharge of an Act of Parliament, or in discharge of some public duty or authority. Whether or not third parties can inquire into the origin of a particular act done by a corporation's servants, so as to be able to contend that it was not done by way of public duty but under a contract, is a different matter, and one which may some day have to be considered, but it is not necessary to decide that question in this case.

Another reason for deciding this case in favour of the plaintiff is, in my opinion, that he is entitled to rely on his contract. He does not know or care whether the corporation was under a duty to its constituents, and the onus is not on him to show that it was intra vires of the defendant authority. It was suggested in the course of the argument that, the action being really a claim in respect of a negligent delivery of coke, it was a matter which any member of the public might equally rely upon, as there was a duty to the public to deliver this coke in a reasonable manner.

(1) [1905] 2 K. B. at p. 14.

No doubt, every one who uses a public highway owes a duty to the public to use reasonable care. Every one who drives a carriage on the high road must drive it carefully, but if by reason of driving it carelessly it comes into collision with another carriage, and the passenger is thrown out, the passenger is not bound to rely upon the duty to the public to drive carefully, as to which possibly there might be some answer. He is entitled to rely upon his contract with the driver to carry him safely. The only criticism which I wish to make upon the reasoning in *Lyles* v. *Southend-on-Sea Corporation* (1) is as to the use of the expression "implied contract" as expressing the relation between a tramway company and a passenger. I think, as Vaughan Williams L.J. said, in such cases there is really no contract. The individual member of the public who desires to enter a tramcar does not invite the tramway company to carry him in consideration of his paying the fare. He merely requires to be carried. Neither the passenger nor the tramcar company makes any offer, nor does either accept an offer, and there is no express or implied contract by the tramway company with the passenger, either to carry him or to carry him safely. There is a statutory duty on the company to carry him, and to carry him safely. That being so, it follows, of course, that *Lyles* v. *Southend-on-Sea Corporation* (1) was rightly decided.

I agree that this appeal should be allowed.

PICKFORD L.J. I am of the same opinion. I do not propose to go through all the authorities that have been cited with regard to the application of s. 1 of the Public Authorities Protection Act. There are two propositions which seem to my mind to be quite clearly established. The first is, that where the defendants, the public authority, are simply discharging a statutory duty, and there is no question of contract in the matter, then the Act applies. The second proposition is that laid down by Farwell J. in *Sharpington* v. *Fulham Guardians* (2), that where the complaint is for a breach of contract which has been entered into by a public authority for the purpose of carrying out a public duty, the public authority cannot claim the protection of the Act. Farwell J.

(1) [1905] 2 K. B. 1. (2) [1904] 2 Ch. 449.

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said in a passage which has already been read (1): "In order to carry out this duty"—that is, their public duty—"they have power to build a house or alter a house, and they accordingly entered into a private contract. It is a breach of this private contract that is complained of in this action. It is not a complaint by a number of children or by a member of the public in respect of the public duty. It is a complaint by a private individual in respect of a private injury done to him. The only way in which the public duty comes in at all is, as I have pointed out, that if it were not for the public duty any such contract would be ultra vires." Those two propositions seem to me to be quite clear. This case falls between those two propositions, and Mr. Scott Fox for the appellants contended broadly that wherever there is the interposition of a contract the statute does not apply. As at present advised I am not prepared to assent to so broad a proposition as that. For instance, if in this case the defendants were supplying gas, and had made a contract under the powers conferred by s. 13 of the Gasworks Clauses Act, by which they sold gas for the lighting of a building at a price different from the ordinary price of gas, I am by no means sure that they would not be discharging a public duty just as much as in supplying gas to any ordinary consumer who is supplied at the regular price. But in the present case it seems to me that the defendants were selling under a voluntary contract. A question arose in the course of the argument as to the position of a person who is a stranger to the contract and who suffers damage in the course of the performance of the contract. I feel a difficulty in seeing how an act can be done in the discharge of a public duty or authority with regard to one person and not with regard to another. I am inclined to think it must be either one thing or the other, whether the person complaining is a party to the contract or not, but it is not necessary in this case to decide that question. The Bradford Corporation, by s. 20 of their Act, are empowered to make and supply gas, and they may sell, manufacture, store, and dispose of coke and other residual products. It is not necessary for them in the disposal of those residual products to enter into any contract at all, but they may

(1) [1904] 2 Ch. at p. 456.

do so if they wish. It may be that there is a moral duty on them to do the best they can for the ratepayers, but there is no statutory duty to enter into a contract with any particular person. If, however, the defendants choose to adopt a method of disposal of the residual products which involves entering into a contract for the purpose, it seems to me that they are then voluntarily entering into a contract and not acting in discharge of their public duty.

So far as regards the plaintiff in this case, the consequences that happened to him were the consequences of the contract. If there had been no contract with him, and the coke had been carted somewhere else, the damage to the plaintiff's window would not have occurred. But as the defendants elected to adopt a method of disposal of the coke which involved their making a contract with the plaintiff, they cannot, according to the authorities, and especially *Lyles* v. *Southend-on-Sea Corporation* (1), be heard to say they were acting simply in the discharge of a public duty.

I agree, therefore, that this appeal should be allowed.

Appeal allowed.

Solicitor for plaintiff: *Edgar Bogue, for Scott, Eames & Mossman, Bradford.*

Solicitors for defendants: *Cann & Son, for F. Stevens, Bradford.*

(1) [1905] 2 K. B. 1.

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In re THE MIDDLE AGE PENSION FRIENDLY SOCIETY.

Friendly Society—Payment of Benefits ultra vires the Rules—Society which "exists for an illegal purpose"—Cancelling of Registry—Friendly Societies Act, 1896 (59 & 60 *Vict. c.* 25), *s.* 77.

By s. 77 of the Friendly Societies Act, 1896, the Chief Registrar may on proof "that a society exists for an illegal purpose" cancel the registry of the society":—

Held, that the mere fact that a society exists for the purpose of doing acts which are ultra vires its rules does not make it a society which exists for an illegal purpose within the meaning of the section. The illegal purpose must be one which is unlawful independently of the rules.

APPEAL from an order of the Chief Registrar of Friendly Societies cancelling the registry of a society.

In 1904 an unregistered friendly society, called the National Old Age Pension Trust, was founded by one William Taverner. In August, 1912, an action was commenced by certain members of the said trust, who were not in receipt of benefits, against Taverner and other officials of the trust claiming that it should be wound up. In May, 1914, judgment was pronounced in the action ordering the trust to be wound up and the assets to be distributed among the persons entitled thereto. In the meantime Taverner had founded a new society called the Middle Age Pension Friendly Society to carry on the business of the old trust which was then about to expire, and the society was registered on June 4, 1913. By its rules it was provided, rule 19, that every member should pay an entrance fee on joining; rule 48, that to become eligible for benefits every member was required to introduce not less than two new members; and, rule 49, that, subject to rule 48, all members who had subscribed for not less than three complete years, or were otherwise specially qualified, and had attained a certain specified age, should be eligible for appointment to pension benefits. Taverner issued circulars to the members of the old trust wherein he proposed to them that they should

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authorize him to receive on their behalf all moneys that might be due to them from the funds of the trust and apply such moneys for the purposes of the new society, and that they should join the new society on the terms that membership of the society should, for the purpose of calculating benefits, date as from the original date of their joining the trust, and that no entrance fee should be charged to them. This preferential treatment of members of the trust was not disclosed in the rules. A large number of members of the trust joined the society on those terms. In pursuance of those terms pensions were paid out of the funds of the society to certain of the members of the trust who had so joined, whereupon on December 30, 1913, Taverner and the other officials of the society were prosecuted under s. 87, sub-s. 3, of the Friendly Societies Act, 1896, as amended by s. 9 of the Friendly Societies Act, 1908 (8 Edw. 7, c. 32), for having wilfully and with intent to defraud applied part of the property of the society to purposes other than those directed in the rules. At the hearing it was admitted that none of the persons to whom pensions were so paid had paid any entrance fee, and that none of them had paid any subscriptions except by deduction from the pensions paid to them. The justices dismissed the information apparently upon the ground that the payments were in their opinion authorized by the rules. The Chief Registrar on February 5, 1914, gave the society notice in writing under s. 77, sub-s. 3, of the Friendly Societies Act, 1896, that he intended, unless cause were shown to the contrary, to cancel the registry of the society on the ground that it existed for an illegal purpose, namely, paying pensions to persons who were not entitled thereto under the rules of the society and contrary to the said rules. The officials of the society then sought to put themselves right by amending their rules into a form which would justify such payments, and at a meeting of the society summoned by them for that purpose a resolution authorizing the said amendment of the rules was passed. The rules were accordingly amended and sent to the Chief Registrar for registration. He objected to register them upon the ground that the meeting at which the resolution was passed had not in his opinion been properly convened. Some correspondence upon the subject passed between

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the society and the registrar, and in a letter dated April 1 the solicitors of the society wrote: "We are prepared to advise our clients to call a fresh meeting of such of the members as should, in your opinion, be summoned, and re-submit the amendments before this meeting." The Registrar persisted in his refusal to register the amended rules, but notwithstanding such refusal the society continued to pay the pensions objected to. On April 18 the Registrar with the approval of the Treasury proceeded under s. 77, sub-s. 1, to cancel the registry of the society upon the grounds specified in his notice. The society appealed.

Foote, K.C., and *Croom Johnson*, for the appellants. This society does not exist for an illegal purpose. What the purpose of a society's existence is must be gathered from its rules. Admittedly the rules are perfectly valid on the face of them. If any breach of the rules is committed, that is ground for proceeding against the persons guilty of the breach, but not for cancellation of the registry of the society. But assuming that the registry may be cancelled for violation of the rules, here they were not violated. The rules authorized the payment of these pensions, for rule 49 expressly provided that pensions might be paid to persons who had not subscribed for three years to the society if they were "otherwise specially qualified," and here the pensioners were so. But even if the rules as originally drawn did not authorize the payments, the society proposed to amend the rules in such manner that they would authorize them, and the Registrar before he can lawfully cancel a registry must be satisfied that the illegal purpose exists at the date of the cancellation. He ought to have registered the amended rules, for he would thereby have made the illegality, if any, to cease. He was bound to register the amendments even though they might have the effect of retrospectively validating the payments that had already been made: *Reg.* v. *Brabrook.* (1)

G. A. Branson, for the Chief Registrar. The Chief Registrar is not strictly a party to this appeal. No rules have yet been made

(1) (1893) 69 L. T. 718.

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under the Act with respect to appeals from him, or authorizing him to be represented by counsel. The result is that there is only one side before the Court. [The Court invited his assistance as amicus curiae.] The illegal purpose referred to by s. 77 must be one not appearing upon the rules, for if it were disclosed by them the rules would never have been registered. The illegal purpose being something outside the rules may consist in an intention either to do something which is malum in se, or to do something in breach of the rules. If this society was brought into being for the purpose of paying these pensions it would be an illegal purpose. It would be largely out of the subscriptions of the new members that the pensions to the members of the old trust would have to be paid. That would be most unfair, for the new members would have paid their subscriptions on the faith of the rules which did not disclose any preferential treatment of a particular class of members. The application of the funds of the society in breach of its rules is expressly prohibited and made illegal by s. 87, sub-s. 3. It may be that if the general purposes of a society are legal the intention of the officials to make incidentally occasional ultra vires payments would not make the society to be one existing for an illegal purpose. It is a question of degree. But here the main object was to make these ultra vires payments. The society was brought into existence in contemplation of an order being made winding up the old trust, and with the object of evading that order by carrying on the trust under a new name for the benefit of its old members. The Registrar was therefore right in holding that the society existed for an illegal purpose.

LUSH J. In this case the Chief Registrar acting under the powers given him by s. 77 of the Friendly Societies Act, 1896, has made an order cancelling the registry of this society upon the ground that it existed for an illegal purpose, and the question is whether there were sufficient facts before him to justify that order. It appears that there had been in existence for some years a trust society, which was the predecessor of the present society, and which has been wound up as the result of litigation commenced some two years ago. The present society

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was registered in June, 1913. Now there is no doubt that the persons managing the business of the society intended to give to those of its members who had been members of the old trust benefits upon a more favourable scale than they gave to new members, and the rules of the society, properly construed, did not justify such favoured treatment. A correspondence with reference to this matter took place between the managers of the society and the Chief Registrar, who on February 5, 1914, gave notice that unless cause were shown to the contrary he proposed to cancel the registry of the society upon the ground that it existed for an illegal purpose, namely, paying pensions to persons who were not entitled thereto under the rules. In order to get rid of the difficulty a resolution was passed at a meeting of the society summoned for the purpose that new rules should be drawn up which would validate the payment of such benefits at all events for the future. The rules were accordingly amended and sent to the Chief Registrar for registration. Objection was taken to the sufficiency of the notices summoning the meeting at which the amendments of the rules were passed, in answer to which the managers of the society, who were desirous of doing all they could to put their rules in proper shape, wrote through their solicitor to the Chief Registrar on April 1 to say that they were prepared to call a fresh meeting in such manner as he should approve. However the matter did not go through, and the Chief Registrar, for what he considered good reasons, refused to register the amended rules. On April 18, in pursuance of the above-mentioned notice, he made the order cancelling the registry, and from that order the society has appealed. It seems unfortunate that although a right of appeal to this Court is given by s. 77, sub-s. 6, no rules have been made under which any arguments can be presented to the Court in support of the Chief Registrar's order. However Mr. Branson has as amicus curiae given us the benefit of his assistance, and having heard arguments on both sides we are in a position to deal with the matter. Now I have no doubt that for the purpose of determining the question whether a society exists for an illegal purpose the time at which the illegality of the purpose is to be considered is the time at which the cancelling

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order is proposed to be made. The question is not whether the society was brought into existence for an illegal purpose, but whether it exists for such a purpose at the date of the order. Having regard to the fact that the society was desirous of having, and had taken all available means for the purpose of having, new rules registered which would make the payment of pensions to the members of the old trust lawful, even if it can be said to have originally existed for an illegal purpose, the illegality of its purpose had ceased at the date when the cancelling order was made. But I go further and am of opinion that at no time did the society exist for an illegal purpose. No doubt the managers of the society always intended to pay and did pay sums of money ultra vires the rules, but that purpose of making ultra vires payments was not in my opinion an illegal purpose within the meaning of s. 77. I think that to bring a case within the section it must be shown that the purpose of the society is to carry out objects which the law prohibits and which are in themselves unlawful even apart from the rules. Mr. Foote contended that the illegality of purpose must be sought for in the rules and in the rules alone, and that the only question is whether the rules as drawn disclose an illegal purpose. With that I do not agree. I do not think it is necessary, in order to establish that a society is an unlawful society, to show that the rules themselves contemplate the doing of acts which are unlawful. The Court may, and often must, look behind the rules; and if a society, the rules of which are on the face of them perfectly legal, has as its real object the doing of something unlawful under the cloak of lawful rules, I think that may well be said to be a society existing for an illegal purpose. But that is not the case that we have to deal with here. I think that the Chief Registrar was wrong in cancelling the registry of this society and that the appeal must be allowed.

ATKIN J. The Chief Registrar has under s. 77, sub-s. 1 (*b*), cancelled the registry of this society in consequence of his being satisfied that it exists for an illegal purpose. The illegal purpose that he complained of was that of paying pensions to persons

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who were not entitled thereto under the rules of the society. That is an allegation merely that the payments are ultra vires, but I see the greatest difficulty in holding that an intention to make ultra vires payments is itself illegal. I do not think that the illegality referred to is necessarily an illegality appearing on the face of the rules. It seems to me plain that if the society makes payments which are independently of the rules illegal, as distinguished from being ultra vires, the fact that the rules themselves are in order will not prevent the purpose of the society's existence from being illegal; but I do not think that the Registrar would be justified in saying that a society which existed for the purpose of making payments which were only unlawful in the sense of being ultra vires was a society which existed for an illegal purpose within the meaning of the section. Further I think the section means that the time when the purpose must be illegal is the time when the Registrar cancels the registry, and in any view of the case I think there was no evidence on which he could find that the purpose of the society was illegal at that time. In point of fact at that time the society had intimated to the Registrar that they were prepared to conform to his wishes and to summon a fresh meeting of the members and submit to them again the proposed amendments of the rules. Under those circumstances it could not reasonably be held that the society had determined to continue making payments contrary to the rules. On both these grounds I think that the appeal should be allowed. I should like to say one word upon the way in which this appeal comes before us. An appeal is given in this case, and a similar appeal is given against a refusal to register a society and also against a refusal to register amendments of rules. I think it is very inconvenient that on such appeals, which may be of very great public interest, only one side should be represented by counsel. I think steps should be taken to secure that the views of the Registrar should be put before the Court by counsel on his behalf, and that if rules are necessary, rules should be made for that purpose. In this case we have had the advantage of hearing Mr. Branson, but a case might arise in which the Court might not have the benefit of any such assistance or might not feel in a position to accept the arguments of somebody who did not in

fact represent the Registrar, and the absence of provision for his representation might give rise to difficulty. I agree that the appeal should be allowed.

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Appeal allowed.

Solicitors for the society: *Corsellis & Brown, for G. T. Cook, Bristol.*

Solicitor for the Chief Registrar: *Solicitor to the Treasury.*

J. F. C.

[IN THE COURT OF APPEAL.]

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Oct. 23, 26; *Nov.* 6; *Dec.* 10.

In re GEIGER.

Bankruptcy—Taxation of Costs—Right of Bankrupt to attend—Sole Creditor—Appointment of himself as Committee of Inspection—Authority to Trustee to employ Solicitor—Irregularity—Formal Defect—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 22, *sub-s.* 1; *s.* 57, *sub-s.* 3; *s.* 73, *sub-s.* 3; *ss.* 89, 143—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 15, *sub-s.* 3.

A debtor was adjudicated bankrupt on April 3, 1913, on the petition of his sole creditor. In December, 1913, he became entitled to property more than sufficient to enable him to pay the petitioning creditor's debt and all costs. On April 7, 1914, the bankruptcy was annulled. In the meantime the sole creditor had appointed himself to be the committee of inspection, and as such committee had purported to fix the remuneration of the trustee and to sanction the employment by him of solicitors. After the annulment the debtor inquired of the trustee's solicitors when their costs were to be taxed and the trustee's remuneration fixed, and stated that he required to be present on the application. He was then informed that the costs had already been taxed and the trustee's remuneration fixed. There were two allocaturs for costs dated respectively March 12 and April 29, 1914, and the amount of the taxed costs was paid by the Board of Trade on May 7, 1914. On May 18 the debtor applied to the county court to reopen the matter, but the registrar refused the application on the ground that he had no jurisdiction to allow the debtor to attend the taxation. The Divisional Court (Horridge and Lush JJ.) referred the matter back to the registrar. Upon appeal from that decision:—

Held, that there was jurisdiction to allow a bankrupt to attend the proceedings under special circumstances such as existed in the present case.

Held, further, that a sole creditor could not appoint himself to be the committee of inspection; there was, therefore, no committee of inspection,

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no sanction of the employment of solicitors, and no retainer. The payment of the costs out of the estate must be disallowed to the trustee and the allocaturs rescinded.

APPEAL from an order of a Divisional Court (Horridge and Lush JJ.)

The debtor, Mr. Frank Geiger, was adjudicated bankrupt on April 3, 1913, on the petition of Mr. Leonard Partridge, the sole creditor for 941*l.* 7*s.* 7*d.*

The first meeting of creditors was held on April 9, 1913, the official receiver acting as chairman, when Mr. T. H. A. Biddle was appointed trustee of the property of the bankrupt.

On April 23 a general meeting of creditors was held at which there were present Mr. F. C. Lewis, special proxy for Mr. Leonard Partridge, and Mr. G. H. Bowles, representing the trustee, who took the chair. At this meeting it was resolved that Mr. F. C. Lewis, general proxy for Mr. Leonard Partridge, be and he was thereby appointed the committee of inspection, with power to fix the trustee's remuneration. On the same day, a quarter of an hour later, a meeting of the committee of inspection was held—present Mr. F. C. Lewis, committee of inspection, and Mr. G. H. Bowles, representing the trustee—when it was resolved that the trustee be and he was thereby sanctioned to employ Messrs. Munns & Longden as his solicitors in terms of specific resolutions to be passed by the committee of inspection from time to time, with authority to employ counsel as and when instructed by the trustee, the trustee not to be personally liable for costs in any way.

At a further meeting of the committee of inspection held on January 9, 1914, it was resolved that upon the amount of all assets realized by the trustee a commission of 10*l.* per cent. be and it was thereby voted to the trustee as remuneration, together with a further commission of 2*l.* 10*s.* per cent. upon the amount distributed in dividend.

Upon the death of his wife on December 7, 1913, Mr. Geiger became entitled to property more than sufficient to enable him to pay his debts and all the costs of the bankruptcy proceedings.

In January, 1914, a sum of 1500*l.* was paid out of Mrs. Geiger's estate to the trustee, being 941*l.* 7*s.* 7*d.*, the amount of the petitioning creditor's debt, and 558*l.* 12*s.* 5*d.* deposit in respect of costs.

On April 7, 1914, an order was made annulling the bankruptcy.

In the meantime, on February 28, 1914, Mr. Geiger's solicitors had written to the trustee's solicitors objecting to his appearing by counsel upon the application to annul the bankruptcy and stating that their client would object to bearing the expense of it. On April 24, 1914, his solicitors again wrote to the trustee's solicitors asking when they expected to carry in their costs for taxation, saying that they should require a copy of them on the usual terms. They also asked when the trustee intended applying for his remuneration to be fixed, saying that they should require to be present on the application, and meantime asking what he claimed. Not receiving any answer to that letter, they wrote again on April 29 asking for a reply. They were then informed that the costs had been carried in some time ago and had been taxed by the registrar, that the trustee's remuneration had been fixed some months ago, and that no further application to the Court would be necessary. There were two allocaturs for costs of the trustee, one dated March 12, 1914, for 218*l.* 10*s.* 5*d.*, and the other dated April 29, 1914, for 27*l.* 1*s.* 10*d.* On May 7 the amount of the taxed costs was paid by the Board of Trade.

On May 18, 1914, Mr. Geiger applied to the Kingston County Court to reopen the taxation, but the registrar dismissed the application. On appeal from that decision the Divisional Court referred the matter back to the registrar to be fully inquired into and dealt with.

Against that order the trustee now appealed.

It appeared that on April 25, 1913, the trustee being in doubt as to his position wrote the following letter to the Inspector-General in Bankruptcy:—

"Sir,—*Re* Frank Geiger, Kingston Court, No. 7/1913. I send you herewith certified copy of the minutes of a general meeting of the creditors herein held on the 23rd day of April, 1913, a

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certified copy of which has been duly placed on the file at the Kingston Court.

"I am, Sir, your obedient servant,

"T. H. W. Biddle, Trustee.

"P.S.—Upon the bankrupt's statements and the information before me there appears to be only one creditor."

To that letter he received the following reply, dated May 6, 1913:—

"Sir,—*Re* F. Geiger. With reference to your letter of the 25th ultimo with enclosure I am directed by the Inspector-General in Bankruptcy to inform you that having regard to sect. 22 (1.) Bankruptcy Act, 1883, a committee of inspection cannot consist of less than three members. I am to add that the creditor can of course give sanction to any matter requiring the sanction of the committee of inspection.

"I am, Sir, your obedient servant,

"F. A. Clarke."

Clayton, *K.C.*, and *Tindale Davis*, for the appellant. The registrar held that he had no jurisdiction to allow the bankrupt to attend the taxation, and if he had a discretion to do so he declined to exercise it. The Divisional Court held that he was wrong and referred the matter back to him. We submit—

1. The order appealed against is contrary to the law and practice in bankruptcy. The bankrupt is not entitled to attend the taxation of costs at all, or to intervene in the proceedings in any way.

2. The taxation was properly carried out and is final.

3. The costs have been paid by the Board of Trade in due course of administration and the matter cannot be reopened.

4. The application by the bankrupt purported to be made in the matter of the bankruptcy, which has been annulled.

5. The exercise of the discretion of the registrar ought not to be interfered with.

The practice on taxation of costs in bankruptcy is to be found in s. 73 of the Bankruptcy Act, 1883, by sub-s. 3 of which the taxing Master has to satisfy himself that the employment of the

solicitors has been duly sanctioned, and in the Bankruptcy Rules, 1886 to 1914, rr. 110, 111, 112 (1.), 112A, 121, 122. Notice of an appointment to tax a bill has to be given to the official receiver and the trustee, but to nobody else: Williams' Bankruptcy Practice, 10th ed., p. 514, note. Under r. 123 only the official receiver and the trustee are to appear. Under r. 121 the Board of Trade may review a taxation, but there is nothing to authorize the appearance of the bankrupt. The Board of Trade has ample power for this purpose: *In re Alison.* (1) Formerly the official receiver had no right to attend taxation although he might obtain leave to do so: *In re Nash & Sons.* (2)

By r. 341 all payments are to be made in such manner as the Board of Trade may direct. A bankrupt who has obtained his discharge and become entitled to the surplus of his estate is not entitled to obtain taxation of a bill of costs paid by his trustee; and the trustee is not a trustee of the surplus for him: *In re Leadbitter* (3); *In re Austin.* (4) A bankrupt cannot interfere in the administration of his estate, and there is no decision that he has a right, or can get leave, to attend taxation. *In re Duncan* (5) is not an authority to that effect, but lays down that where there is no committee of inspection the Board of Trade may limit the amount of costs. The question depends on bankruptcy law and practice and a creditor has been given leave to attend: *In re Marsh.* (6) Here there was a sufficient appointment of solicitors: *In re Vavasour.* (7) The Court has no inherent jurisdiction to give the bankrupt leave to attend. The bankruptcy law is a complete code, and everything which is intended to be dealt with is referred to in the Acts and Rules. The position of the bankrupt when the bankruptcy is annulled is dealt with by s. 35 of the Act of 1883 and r. 194.

Hansell, for the Board of Trade. All payments are made into and out of the bankrupt's account and the Board of Trade are the only persons who can draw on that account. That is done on the responsibility of the trustee, and his accounts are audited

(1) [1892] 2 Q. B. 587.
(2) [1896] 1 Q. B. 13.
(3) (1878) 10 Ch. D. 388.
(4) (1879) 10 Ch. D. 434.
(5) [1892] 1 Q. B. 879.
(6) (1885) 15 Q. B. D. 340.
(7) [1900] 2 Q. B. 309.

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under s. 78. The annulment of the bankruptcy does not put an end to the jurisdiction of the Court to do justice between the parties. Under r. 353 the old practice remains in force, so the jurisdiction continues: *In re Pitman* (1); *Ex parte Cowan.* (2) It has been held under the Bankruptcy Act of 1869 that annulment of the bankruptcy in no way interferes with the power of the Court: *In re Chidley* (3); *In re Ranby* (4); *West* v. *Baker.* (5)

[At the suggestion of the Court the further hearing of the case was adjourned in order that the Board of Trade might consider the items in the bill of costs.]

Nov. 6. *Hansell,* for the Board of Trade. The bill has not been dealt with by the Board of Trade under r. 124 of the Bankruptcy Rules, but it has been examined, and the Board have no reason to object to any of the items.

F. Mellor (*Gore-Browne, K.C.*, with him), for the respondent. The trustee has not been properly authorized to employ a solicitor, and there has therefore been no retainer. The employment of solicitors by the trustee is regulated by s. 57, which provides that "The trustee may, with the permission of the committee of inspection . . . . (3.) employ a solicitor or other agent to take any proceedings or do any business which may be sanctioned by the committee of inspection." By the Bankruptcy Act, 1890, s. 15, sub-s. 3, before there can be any employment of a solicitor at all, it must be sanctioned by the committee of inspection. By s. 22 of the Act of 1883, sub-s. 1, the committee of inspection must consist of not more than five nor less than three persons. By sub-s. 9, "If there be no committee of inspection, any act or thing or any direction or permission by this Act authorized or required to be done or given by the committee may be done or given by the Board of Trade on the application of the trustee." There was no such application here, and there was no properly constituted committee of inspection.

The matter was properly referred back to the registrar by the Divisional Court.

(1) (1819) Buck, 428.
(2) (1819) 3 B. & Ald. 123.
(3) (1875) 1 Ch. D. 177.
(4) (1880) 14 Ch. D. 467.
(5) (1875) 1 Ex. D. 44.

A sole creditor cannot exercise the functions of a committee of inspection as was suggested by the Board of Trade in the letter of May 6, 1913.

Clayton, K.C., in reply. The whole body of creditors can override the committee of inspection: s. 89 of the Act of 1883; Williams on Bankruptcy, 10th ed., p. 370. A single creditor like the general body of creditors has an overriding right over the committee of inspection. This is a mere irregularity and ought to be treated as a formal defect under s. 143 of the Act of 1883.

Assuming that a single creditor cannot constitute a committee of inspection, then the Board of Trade could have acted under s. 22, sub-s. 9. The Board of Trade expressed the view in their correspondence with the trustee that a single creditor could exercise the powers of a committee of inspection, and the trustee acted upon that view. This therefore is a mere irregularity. The bill of costs has been submitted to the Board of Trade, who have taken no exception to any of the items. By s. 143, sub-s. 2, no defect or irregularity in the appointment of a member of a committee of inspection shall vitiate any act done by him in good faith. No lack of good faith is suggested here.

[LORD COZENS-HARDY M.R. If there be no committee at all sub-s. 2 has no application.]

Hansell, for the Board of Trade. The Board has no desire to intervene between the bankrupt and the trustee. The view of the Board is based on s. 89, which gives the creditors the right to control the trustee. Where there are less than three creditors the Board thought that the scheme of the Act did not provide for the formal election of a committee of inspection, but by s. 89 gave to the two creditors, or if only one to the sole creditor, the right of control over the trustee.

[LORD COZENS-HARDY M.R. referred to s. 90.]

Yes, that is an additional protection, but it does not affect this point.

The Board suggests that this is the merest formality and is cured by s. 143.

[*Clayton, K.C.*, referred to r. 350.]

Sect. 143, sub-s. 1, is wider than that rule.

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F. Mellor in reply. The true view of the practice is that if the creditors choose to elect a committee of inspection, then the members of that committee are placed in a fiduciary capacity and are given the right of control. By r. 316 no member of the committee may, except by the leave of the Court, purchase any part of the estate. There is no such provision in the case of an ordinary creditor.

[SWINFEN EADY L.J. referred to r. 317, which prohibits a member of the committee, except with the sanction of the Court, from deriving any profit from any transaction arising out of the bankruptcy.]

Yes. There are certain disabilities if there is a committee, but if there is no such body, then it is for the Board of Trade to sanction what is required to be sanctioned by a committee if it exists. This defect is one of substance and not merely formal.

Cur. adv. vult.

Dec. 10. LORD COZENS-HARDY M.R. The facts in this case have been stated so fully and accurately by Swinfen Eady L.J. in his judgment that I propose to confine myself to the questions of law which arise for our determination.

It is the settled practice not to allow a bankrupt to intervene in or take part in the proceedings unless there are circumstances which justify a special order in his favour. That there is jurisdiction to make such an order is settled: *In re Nash & Sons* (1) and *In re Marsh.* (2)

Where, as in the present case, all creditors have been paid and the only person really interested in taxing the costs is the bankrupt, it seems to me obviously just that such an order should be made in his favour. This was the view of the Divisional Court, and I think their decision was right.

There is, however, a further and important question which was not decided in the Divisional Court, although it was referred to. There was only one creditor who proved in the bankruptcy. On April 23, 1913, at a general meeting of creditors a resolution was passed purporting to appoint Mr. F. C. Lewis, general proxy

(1) [1896] 1 Q. B. 13. (2) 15 Q. B. D. 340.

for the sole creditor, the committee of inspection with power to fix the trustee's remuneration. This was plainly invalid, as was pointed out by the Board of Trade in their letter of May 6, which is as follows: [The Master of the Rolls read the letter above set out and continued:] Meetings of "Mr. F. C. Lewis, committee of inspection," were from time to time held. On April 23 it was resolved that the trustee be and he was thereby sanctioned to employ Messrs. Munns & Longden as his solicitors in terms of specific resolutions to be passed by the committee of inspection from time to time, with authority to employ counsel as and when instructed by the trustee, the trustee not to be personally liable for costs in any way. And on January 9, 1914, a meeting of the committee of inspection was held, and it was resolved "that on the amount of all assets realized by the trustee a commission of 10*l.* per cent. be and is hereby voted to the trustee as remuneration, with a further remuneration of 2*l.* 10*s.* per cent. to be paid upon the amounts to be distributed in dividends." All these proceedings were in direct conflict with the provisions of s. 22, sub-s. 9, of the Bankruptcy Act, 1883, which enacts that where there is no committee of inspection the Board of Trade are to do any act or give any direction which might be done or given by the committee if there had been one. By s. 57, sub-s. 3, the permission of the committee of inspection is required to the employment of a solicitor, and by s. 15, sub-s. 3, of the Act of 1890, such sanction must be obtained before the employment. And similar observations apply to the remuneration of the trustee under s. 72, sub-s. 1, of the Act of 1883, although the remuneration need not be fixed before the appointment. In my opinion there was no retainer of Messrs. Munns & Longden, and their bill of costs cannot be taxed as against, or paid out of, the bankrupt's estate. They may or may not have a claim against the trustee personally. The view expressed by the Board of Trade in their letter of May 6 that the sole creditor can of course give sanction to any matter requiring the sanction of the committee of inspection is, in my opinion, wrong. It is contrary to the express language of s. 22, sub-s. 9. Moreover, on principle it is impossible to maintain the proposition. The statute is full of provisions recognizing the fiduciary position of members of a committee of inspection and imposing

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restrictions upon their powers, none of which would apply to a sole creditor.

Then it is contended that this is a "formal defect" or "irregularity" within s. 143, and that the retainer ought not to be invalidated. In my opinion, this is by no means a formal matter. Parliament has enacted that a solicitor shall not be entitled to be paid unless the sanction required is given before the employment; and that a subsequent sanction will avail nothing. The prior sanction is substance, and not form.

In my opinion, it is not necessary to go through the form of allowing the bankrupt to attend the taxation. He would at once raise the point of no retainer, and that point would be fatal. The proper order will be to declare that the necessary permission to employ solicitors was not obtained and that the two sums of 218*l.* 10*s.* 5*d.* and 27*l.* 1*s.* 10*d.* already paid out of the estate to the solicitors must be disallowed to the trustee and the allocaturs may be rescinded.

The appellant must pay the costs of the appeal, and also the costs in the county court and in the Divisional Court.

KENNEDY L.J. There are two questions to be dealt with as the matter was argued in this Court.

The Divisional Court, upon the application of the bankrupt, has decided in substance that it was right that the matter of the taxation of the costs of the trustee in bankruptcy should go back to the registrar of the county court of Surrey, holden at Kingston, in order that the taxation should be reopened, and that leave ought to be given to the bankrupt to attend the taxation. The first question which this Court has had to consider is the propriety of that decision. I agree entirely with the judgments of the Master of the Rolls and Swinfen Eady L.J., that that decision ought to be upheld, for the reasons which they have given. The bankrupt had no statutory right to be present at the taxation of the costs of the trustee; the registrar, or, on appeal, the Court, may in a proper case in special circumstances give him leave to attend, and the special circumstances do exist in the present case.

The second question raised before us is, in my judgment, a

more difficult one. By s. 22, sub-s. 1, the creditors "may" (not "must") appoint a committee of inspection. If they do appoint a committee of inspection, it must consist of not less than three members. Under s. 57, it is for the committee of inspection, if appointed, to authorize the trustee, if they think proper, to employ a solicitor, and generally to take such steps, specified in the section, as they may approve in the administration of the bankrupt's estate in reference to the matters specified in that section. If there is no committee of inspection, s. 22, sub-s. 9, applies. That section is worth referring to, to make the judgment clear. It is as follows: "If there be no committee of inspection, any act or thing or any direction or permission by this Act authorised or required to be done or given by the committee may be done or given by the Board of Trade on the application of the trustee." That gives the Board of Trade power to do what the committee of inspection might have done. In the present case, there was only one creditor, a Mr. Partridge, who had been the petitioning creditor, and at what is called a general meeting of creditors held on April 23, 1913, a Mr. F. C. Lewis, special proxy for Mr. Partridge the creditor, who, with the exception of Mr. Bowles, who represented the trustee, constituted the meeting, is recorded as having carried a unanimous resolution that Mr. F. C. Lewis, general proxy for Mr. Partridge, be appointed the committee of inspection, with power to fix the trustee's remuneration. This appears to me to have been a plainly improper proceeding. A quarter of an hour later a meeting of the committee of inspection is recorded. Again, only Mr. F. C. Lewis and Mr. Bowles, representing the trustee, were present, and resolutions (which I need not quote at length) were passed by Mr. Lewis empowering the trustee to employ Messrs. Munns & Longden as his solicitors, authorizing the employment of counsel, and sanctioning certain other legal proceedings. All this appears to me to have been done in contravention of the statute, because there was no valid committee of inspection. The retainer of the solicitor was in point of law, therefore, not a legal retainer. The trustee never had the authority to give it which the Bankruptcy Act requires.

The hesitation which I have felt to some extent in agreeing

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with the other members of this Court as to the consequent disallowance of the trustee's costs, although it is only fair to say that the Board of Trade, in answer to an inquiry which was suggested by this Court, could see no ground for thinking the charges in themselves improper or excessive, has been due to the fact that the trustee in this case appears to have received from the Board of Trade a communication, dated May 6, 1913, which, though of course it did not influence the earlier proceedings of April 23 which I have already stated, may, from and after its receipt, not unreasonably be supposed to have operated upon the mind of the trustee so as to lull any doubt in his mind as to the validity of the authority under which he was acting in incurring costs. [The Lord Justice read the letter and continued:] I do not know how much of the costs in question was incurred after the date of the receipt of that letter, which I assume to have been May 7, but very probably the greater part I should conjecture was incurred after that date. The trustee had written on April 25 to the Board of Trade in the following terms. [The Lord Justice read the letter and continued:] With all respect to the official who wrote the letter which I have read of May 6, the advice contained in the last sentence was in my view somewhat misleading advice. The intention of the Legislature according to the language of the Bankruptcy Act appears to be that, if there is no committee of inspection, the authority for certain acts (of which the employment of legal assistance is one) which the committee of inspection, if the creditors have appointed such a committee, may give should be obtained by the trustee from the Board of Trade: s. 22, sub-s. 9. It is true that the word used in that sub-section is "may," but it is clear that it cannot be intended that the trustee, because there is no committee of inspection, should have an unlimited discretion, and I see no other method prescribed by the statute as to obtaining authority elsewhere. The view of the Board of Trade apparently is that if there is a creditor, be it only one, he can give sanction to any matter which, under s. 57, requires the sanction of the committee of inspection. The only provision which might lend colour to this view appears to me to be s. 89, which gives power to creditors by resolution to override directions given by a committee of inspection. But

this is limited to the administration of the property of the bankrupt, and the distribution thereof amongst his creditors according to the words of the section, and no inference drawn from this can, as it appears to me, be preferred to that which arises from s. 57 read with s. 22, sub-s. 9, and the absence of any provision in terms authorizing either a creditor or a number of creditors to sanction the action of the trustee in respect of any of the matters mentioned in s. 57 leads to the same conclusion. If this be so, the advice of the Board of Trade in the letter of May 6, 1913, was incorrect so far as the particular matters with which we are concerned stand, and this trustee had no authority under the statute for retaining the solicitors as he did.

It is a minor point, but I will add that even if, as representing in his single person a general meeting of creditors, the one creditor could have given the requisite sanction to the trustee, he did not in fact so act, but purported by his general proxy to give the authority as a committee of inspection at a meeting of the committee of inspection. Having regard to the fact that the Board of Trade have signified through their counsel that they find no fault with the items in the bill of costs, and to the Board of Trade's letter of May 6, with which I have dealt, I should myself have been glad if I could have felt justified in applying in favour of this trustee the provisions of s. 143 of the Bankruptcy Act. But the employment of a solicitor and the consequent expenditure in legal proceedings must be regarded as a serious matter, and the employment of the solicitor by the trustee being in this case, in my view, not merely irregular, but altogether ultra vires, as there has been no sanction given either by a committee of inspection or by the Board of Trade, I do not think that this Court would be justified in treating it as merely, within the words of s. 143, a "formal defect or irregularity" which can be cured under this section.

I agree, therefore, with the judgment pronounced by the Master of the Rolls, and also with the order which he has stated as the order of the Court.

SWINFEN EADY L.J. This is an appeal from an order of the Divisional Court made on July 21, 1914, in the bankruptcy of

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Frank Geiger. Frank Geiger was adjudicated bankrupt on April 3, 1913, on the petition of Partridge, a creditor for 941*l.* 7*s.* 7*d.* Partridge was the bankrupt's only creditor.

The bankrupt's wife, Mrs. Caroline Geiger, died on December 7, 1913, and under her will the bankrupt became entitled to property worth nearly 20,000*l.*, in any case much more than sufficient to enable him to pay his debt and all costs and obtain an annulment of the bankruptcy.

After some correspondence, on January 21, 1914, 941*l.* 7*s.* 7*d.* was paid out of the wife's estate to the trustee, as the amount of the petitioning creditor's debt, and on January 30, 1914, the further sum of 558*l.* 12*s.* 5*d.* (making together 1500*l.*) as a deposit in respect of costs, and on February 3, 1914, the executors of Mrs. Caroline Geiger gave to the trustee an undertaking in writing to pay out of her assets any further sum which might be necessary to provide for payment in full of any debts, interest (if any), and costs of the bankruptcy.

On April 7, 1914, an order was duly made annulling the bankruptcy.

The question arising on this appeal has reference to the costs incurred in the bankruptcy.

When the bankrupt had come into property sufficient to secure the annulment of the bankruptcy, his solicitors evinced an anxiety to keep down costs as much as possible. On February 28 they wrote objecting to the trustee appearing by counsel on the application to annul, and stating that their client would object to bearing the expense of it. On April 24, 1914, his solicitors wrote to the trustee's solicitors asking when they expected to carry in their costs for taxation, saying that they should require a copy of them on the usual terms. They also asked when the trustee intended applying for his remuneration to be fixed, saying they should require to be present on the application, and meantime asking what he claimed. Not receiving any answer to that letter, they wrote again on April 29, asking for a reply. They were then informed that the costs had been carried in some time ago and had been taxed by the registrar, and that the trustee's remuneration had been fixed some months ago, and that no further application to the Court would be necessary.

There are two allocaturs for costs of the trustee—one dated March 12, 1914, for 218*l.* 10*s.* 5*d.*, and the other dated April 29, 1914, for 27*l.* 1*s.* 10*d.* On May 7 the amount of the taxed costs was paid by the Board of Trade. On May 11 the applicant's solicitors wrote to the trustee's solicitors that they were instructed to take proceedings to reopen the matter. They added: "Knowing as of course you did that our clients had all along claimed the right to tax your costs, and to a voice in the settlement of the amount of the trustee's remuneration, and his expenses, and that you never gave us a hint that such right was questioned, we are surprised that you and the trustee should have thought fit to proceed as you did, without any notice to Mr. Geiger or ourselves. The suggestion that the person or persons who have to pay the trustee's remuneration and costs are not to have a voice in the amounts proper to be allowed appears to us to be most unreasonable, and is one that cannot possibly be maintained." On May 18 the applicant gave notice of an application in the county court to reopen the matter, but the registrar refused the application. On appeal, the Divisional Court took a different view and said that the matter must go back to the registrar to be fully inquired into and dealt with. Various questions which arise were referred to. Horridge J. drew attention to the fact that the creditors consisted of one gentleman who appointed himself the committee of inspection, and then purported to fix the remuneration of the trustee and to give authority to the trustee to employ solicitors, and that when the question of taxing the solicitors' costs came before the registrar in the first instance, a letter from the Board of Trade (dated June 25, 1908) was produced saying that where there was one creditor only he could exercise the functions of the committee of inspection. Lush J. said that, having regard to the authorities, it was clear that a bankrupt was a person who under some circumstances ought to have leave to attend the taxation of costs, and if there could be a case in which the bankrupt ought to have leave, this certainly was one, as the bankrupt was the only person concerned in the question first of all whether any costs were payable—which involves the question whether the solicitors were properly employed—and, secondly, in the question of the amount of the costs.

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The trustee now appeals from the decision of the Divisional Court, referring the matter back to the registrar that the whole question may be reconsidered by him.

Upon the question whether the registrar had jurisdiction to give the bankrupt leave to attend the taxation, I am of opinion that he had jurisdiction, and that it was a proper case in which to exercise the jurisdiction, and give leave. The bankrupt having received ample means to pay all his liabilities in full, he is interested in keeping the costs as low as possible; he is the person really paying the costs, and should certainly be allowed to have a voice in considering the amount proper to be allowed. He is not entitled as of right to attend; he cannot do so without special leave; but it is well settled that the Court can, under special circumstances, give leave to a person to attend, who would have no right otherwise to do so. Thus in *In re Marsh* (1) the wife of the bankrupt, who had been admitted as a creditor upon his estate, obtained an order giving her leave to attend the taxation of costs; and she was heard on appeal. In *In re Duncan* (2) a bankrupt, whose debts had been paid in full, applied to the Court to review the taxation, and succeeded; on appeal by the official receiver, the Court heard counsel for the bankrupt and dismissed the appeal. It appears from the report of the case in 8 Morrell, 297, that leave to attend the taxation of the costs was given to the bankrupt by Mr. Registrar Giffard. Again, when an official receiver had no right to attend a taxation, it was held that the Court could give him leave to do so. In *In re Nash & Sons* (3) Vaughan Williams L.J. said: "I have no doubt that it is within the inherent power of the Court to order that he shall attend at a taxation if the Court thinks it right." I agree with the view expressed by Lush J., that if there could be a case in which the bankrupt ought to have leave, this was such a case.

The further question raised in the Divisional Court has also been fully argued before us, namely, whether the solicitors were properly employed. This in turn depends on the question

(1) 15 Q. B. D. 340. (2) [1892] 1 Q. B. 331, 879.
(3) [1896] 1 Q. B. 13, at p. 17.

whether one creditor can appoint himself to be the committee of inspection; or whether, where there is only one creditor, he can exercise the functions of a committee of inspection.

By the Bankruptcy Act, 1883, s. 57, sub-s. 3, the trustee may, with the permission of the committee of inspection, employ a solicitor to take any proceedings or do any business which may be sanctioned by the committee of inspection. By the provision at the end of this section, the permission shall not be a general permission to do all or any of the things mentioned in the section, but shall only be a permission to do the particular thing or things for which permission is sought in the specified case or cases. By s. 73, sub-s. 3, the taxing Master is to satisfy himself, before passing a solicitor's bill, that the employment of such solicitor in respect of the particular matters out of which the charges arise has been duly sanctioned. And by r. 117, before taxing the bill of any solicitor the taxing officer shall require a copy of the resolution or other authority sanctioning the employment. Great care was thus taken by the Legislature that bankrupts' estates should not be wasted by any unauthorized costs being allowed out of them. But the practice was made still more stringent in 1890. Sect. 15, sub-s. 3, of the Bankruptcy Act, 1890, enacts that the sanction required under s. 73 of the principal Act for the employment of solicitors must be a sanction obtained before the employment, except in cases of urgency, and in such cases it must be shown that no undue delay took place in obtaining the sanction.

The question then arises, Did the trustee in the present case obtain the sanction of any committee of inspection before employing a solicitor?

By s. 22, sub-s. 1, of the Act of 1883, the committee of inspection shall consist of not less than three persons. Here, what happened was that on April 23, 1913, at a general meeting convened of the bankrupt's creditors, Mr. F. C. Lewis, who was special proxy for Mr. Leonard Partridge, the sole creditor, purported to appoint Mr. F. C. Lewis, general proxy for Mr. Leonard Partridge, the committee of inspection. He had no power to do this, nor could Mr. Lewis alone become or constitute a committee of inspection, and the authority purporting to be given

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by Mr. Lewis as committee of inspection was of no value. There was in fact no committee of inspection.

The Act then provides by s. 22, sub-s. 9, that "If there be no committee of inspection, any act or thing or any direction or permission by this Act authorised or required to be done or given by the committee may be done or given by the Board of Trade on the application of the trustee." But in this case there was no permission of the Board of Trade to the employment of a solicitor.

Reliance was then placed by the trustee on s. 89, sub-s. 1, of the Bankruptcy Act, which enables the creditors to override any directions of the committee of inspection, and it was urged that, even if there had been a committee of inspection, the direction of Mr. Partridge, as sole creditor, would in case of conflict prevail, and he sanctioned the employment of a solicitor. The answer to this argument is that there is not any case of conflict, there was no committee of inspection, and, moreover, the sub-section begins "Subject to the provisions of the Act," and one of these provisions is that where there is not any committee of inspection the permission of the Board of Trade is necessary to the employment of a solicitor. It was then urged that the absence of the necessary permission was merely a formal defect and was covered by s. 143 of the Act. In my opinion, the absence of the necessary permission to employ a solicitor is not a mere formal defect or irregularity, but a matter of substance and of great importance. It is a material check and safeguard against costs being unnecessarily or improperly incurred. The decision of the Court of Appeal in *In re Duncan* (1) shows with what strictness the provisions of the Bankruptcy Acts and Rules will be enforced. Permission had been given there to incur costs not exceeding 250*l.*, and a bill of costs amounting to upwards of 500*l.* had been incurred. It was held that as against the bankrupt's estate not more than 250*l.* could be allowed, although all creditors had been paid in full and the bankruptcy annulled. Fry L.J. said (p. 889): "If anything can show the importance of keeping a strict hand upon this kind of employment, this case is a proof of it."

(1) [1892] 1 Q. B. 879.

In my opinion, it would be most inexpedient to introduce or sanction any laxity of practice in bankruptcy, or gloss over irregularities and condone them as merely "formal defects." This would be to abolish the safeguards, which the Acts and Rules, founded on long bankruptcy experience, have set up, to promote speedy and economical administration in bankruptcy.

In my opinion the proper order to make in this appeal is to say that permission has not been duly given to the trustee to employ a solicitor, and that the payment already made out of the estate must be disallowed to the trustee.

It is clear that neither the payment to the solicitors of the amount of the allocaturs, nor the audit of the trustee's accounts, nor the annulment of the bankruptcy prevents this Court from having full jurisdiction to deal with the matter on the present application.

Solicitors: *Munns & Longden; Williams & James; Solicitor to the Board of Trade.*

G. A. S.

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[IN THE COURT OF APPEAL.]

JAY'S FURNISHING COMPANY *v.* BRAND & CO. AND ANOTHER.

Distress—Rent—Exemptions—Goods of Stranger—"Goods comprised in hire purchase agreement"—Law of Distress Amendment Act, 1908 (8 *Edw.* 7, *c.* 53), *s.* 4.

The plaintiffs let furniture to the tenant of a flat under a hire purchase agreement which provided that: "If the hirer does not duly perform and observe this agreement, the same shall ipso facto be determined, and the hirer shall forthwith . . . . return the said goods to the owners, and the owners shall be entitled to retake possession of the same as being goods wrongfully detained by the hirer, and for that purpose to enter on any premises where the goods may be."

The hirer having fallen into arrear with his weekly payments under the agreement, the plaintiffs served upon him a written notice that the agreement was terminated and demanding the return of the goods; and they endeavoured unsuccessfully to retake possession. On the next day the landlord distrained upon the goods for arrears of rent of the flat where the goods were:—

Held, affirming the decision of the Divisional Court [1914] 2 K. B. 132, that the goods were at the time of the distress "comprised in a hire purchase agreement," within the meaning of s. 4 of the Law of Distress Amendment Act, 1908, and therefore were not protected from distress by ss. 1 and 2 of the Act.

APPEAL by the plaintiffs from a decision of a Divisional Court (Ridley and Bankes JJ.) (1) affirming a decision of the judge of the Brompton County Court.

By a hire purchase agreement, dated March 8, 1913, the plaintiffs, the owners, let to one Bray, the hirer, certain furniture at the weekly rent of 11*s.* 6*d.* on the following, amongst other, terms:—

"1. The hirer agrees with the owners as follows: (*a*) To pay punctually the said rent weekly commencing on March 27, 1913, and all expenses incurred in the collection of any arrears thereof . . . . (*f*) If the hirer does not duly perform and observe this agreement, the same shall ipso facto be determined, and the hirer shall forthwith at his own expense return the said goods to

(1) [1914] 2 K. B. 132.

the owners, and the owners shall be entitled to retake possession of the same as being goods wrongfully detained by the hirer, and for that purpose to enter upon any premises where the said goods may be. Notwithstanding such return or retaking of the said goods, the hirer shall remain liable for arrears of hire up to the date of such determination of this agreement.

"2. The owners agree with the hirer as follows: (*a*) The hirer may terminate the hiring by giving the owners one week's notice and at the expiration thereof delivering up to them the said goods, without prejudice to the owners' right to recover any arrears of rent and damages for any injury to the said goods and any costs expenses or payment that the owners may have been put to in order to get possession of the said goods. (*b*) If this agreement be duly performed by the hirer, the hirer may, at any time during the continuance thereof, provided the rent be regularly paid in the manner aforesaid, purchase by a cash payment the said goods of the value named in the schedule hereto, in which case credit shall be given for the amount paid for option and rent paid. (*c*) The parties hereto expressly agree that the hirer shall in no case be entitled to any credit for the said amount paid for option or for the said rent, or any part thereof, except on purchase of the said goods under the provisions of paragraph (*b*), clause 2, and that the said goods shall otherwise remain the property of the owners subject to the provisions of this agreement only."

Bray paid the weekly rent due on March 27 and April 3 and 10, in each case a few days late, and it was accepted by the plaintiffs. The rent becoming due for each of the following four weeks was not paid, and the plaintiffs, in each week, sent a written application for payment. On May 8 Bray wrote promising to pay the four weeks' arrears on May 9. On May 14 the plaintiffs wrote to Bray as follows: "We beg to give you notice that the hiring agreement which we entered into with you has now been terminated and that we demand the return of our goods. Please see same are handed over to our representative." This letter was placed in the letter-box at Bray's residence, but he had then left and never actually received the letter. On the same day the plaintiffs sent a van to remove the furniture, but

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were unable to do so owing to the premises being locked up. On May 15 Bray's landlord levied a distress upon the premises for arrears of rent due from Bray and the goods in question were seized. On May 16 the plaintiffs served upon the bailiff a notice, under s. 2 of the Law of Distress Amendment Act, 1908, stating that Bray had no right of property or beneficial interest in the goods distrained upon, but that they were the property of the plaintiffs and were not goods to which the Act was expressed not to apply. The landlord, however, refused to give up the goods except upon payment of 9*l.* 14*s.* 6*d.* for rent and costs. The plaintiffs paid that sum under protest, and brought this action against the bailiff and the landlord to recover the amount as damages for illegal distress.

The county court judge found that default had been made on March 27 and continuously since, but that the plaintiffs had waived that default and treated the agreement as still subsisting, and that it was so treated by Bray and was not repudiated by him until after the distress; and he held that the agreement was not dead and that the goods were still comprised in it, and that the case was governed by the decision in *Hackney Furnishing Co.* v. *Watts*. (1) Judgment was accordingly given for the defendants. The plaintiffs appealed, with leave.

The Divisional Court (Ridley and Bankes JJ.) dismissed the appeal on the ground that at the time of the distress the goods were "comprised in a hire purchase agreement" within the meaning of s. 4 of the Law of Distress Amendment Act, 1908, and were therefore not protected from distress by ss. 1 and 2 of the Act. (2)

The plaintiffs appealed.

P. O. Lawrence, K.C., and *Schwabe, K.C.* (*F. Hinde* with them), for the appellants. First, s. 4 of the Law of Distress Amendment Act, 1908, excludes from the operation of the Act goods comprised

(1) [1912] 3 K. B. 225.

(2) Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53): Sects. 1 and 2 exempt from distress the goods of a stranger upon certain conditions; and s. 4: "This Act shall not apply—(1.) to goods belonging to the husband or wife of the tenant whose rent is in arrear, nor to goods comprised in any bill of sale, hire purchase agreement, or settlement made by such tenant . . . ."

in any bill of sale, hire purchase agreement, or settlement made by a tenant. In the case of a bill of sale or settlement the tenant clearly would be the grantor, not the grantee. It follows from the position of the words "hire purchase agreement" in the section that it only applies to hire purchase agreements where the tenant is the owner of the goods and lets them on hire to some other person. The section does not apply to a case like the present where the goods are hired by the tenant.

[BUCKLEY L.J. This point was not taken in the county court, and therefore it cannot be taken in this Court.]

Secondly, at the time of the distress the goods were not comprised in a hire purchase agreement within the meaning of s. 4. When default was made in the payment of the rent on March 27 the agreement was determined in so far as it was a demise of the goods. That result follows from the presence in the agreement of the words "ipso facto," but for which the agreement would, no doubt, have been voidable only, as was the case in *Hackney Furnishing Co.* v. *Watts.* (1) The agreement may have remained alive for the purpose of enabling the plaintiffs to exercise their rights of retaking possession and recovering arrears of rent, but the goods were no longer "comprised" in the agreement, the demise having been determined: *Cookson* v. *Swire.* (2) The object of the clause as to retaking possession was to define the legal position of the parties after the goods had been taken out of the agreement by its determination. If the agreement was determinable at the option of the plaintiffs, they exercised their option by giving notice to the hirer, before the distress was levied. [They also referred to Coke upon Littleton, 215a, *Doe* v. *Bancks* (3), *Roberts* v. *Davey* (4), and *Davenport* v. *The Queen.* (5)]

E. Grimwood Mears, for the respondents, was not called upon to argue.

BUCKLEY L.J. The question in this case arises under the Law of Distress Amendment Act, 1908. The language of s. 1 of that Act might lead one to think that the Act was addressed only

(1) [1912] 3 K. B. 225.
(2) (1884) 9 App. Cas. 653.
(3) (1821) 4 B. & Ald. 401.
(4) (1833) 4 B. & Ad. 664.
(5) (1877) 3 App. Cas. 115.

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to the case where there is a superior landlord, a tenant, and an undertenant; but it is plain upon reading other sections of the Act that it is not confined to that case. For instance, in s. 4 there is a provision that the Act shall not apply "to goods belonging to the husband or wife of the tenant whose rent is in arrear." The tenant there referred to is the tenant of the person called the superior landlord in s. 1, and therefore the Act is excluding the case where the goods belong to the husband or wife of the tenant, implying that but for the exclusion the Act would have applied although there was no undertenant. The matter is made still more plain by s. 9, which says that "the words 'superior landlord' shall be deemed to include a landlord in cases where the goods seized are not those of an undertenant or lodger."

The facts of this case are that one of the defendants, Palliser, was a landlord, whose agents, Brand & Co., are the other defendants. A man named Bray was the tenant of Palliser. Bray hired certain furniture from the plaintiffs. Palliser is, therefore, the "superior landlord" referred to in s. 1, and the plaintiffs come within the words "any other person whatsoever not being a tenant of the premises or any part thereof, and not having any beneficial interest in any tenancy of the premises or of any part thereof." The furniture was hired by Bray from the plaintiffs at a weekly rent under a hire purchase agreement. The first payment for rent had to be made on March 27, 1913. On that date Bray made default in payment. He subsequently was in default on other dates which I will mention presently. On May 14 the plaintiffs wrote a letter to Bray, which in fact never reached his hands, giving him notice "that the hiring agreement which was entered into with you has now been terminated and that we demand the return of our goods." On the same day they sent to Bray's flat to fetch the goods, but the flat was closed, so that they could not get in, and they went away, having left the letter in the letter-box. On May 15 the landlord put in a distress. Thereupon on May 16 the plaintiffs made the declaration which is referred to in s. 1 of the Act of 1908, and on May 21 they paid the rent under protest, and brought this action to recover the money, a sum of 9*l.* 14*s.* 6*d.* The question is whether they are entitled to recover that sum.

The relevant provisions of the Act are these. The common law right of the landlord to distrain is by the Act restricted as regards goods of a certain character, but s. 4 provides that the Act shall not apply to goods comprised in a hire purchase agreement. The question is whether the plaintiffs' goods at the relevant date were comprised in a hire purchase agreement. If they were, the Act does not apply to them, that is to say, the landlord is not prevented from distraining upon them; in such case the distress was good, and the plaintiffs' claim fails.

A point was raised in this Court upon which I will express no opinion, because it was not, I think, open to the appellants. The point was this. In s. 4, sub-s. 1, the sequence of words is: "goods comprised in any bill of sale, hire purchase agreement, or settlement made by such tenant." It is pointed out, and quite accurately, that as regards a bill of sale or settlement made by the tenant, the tenant is the grantor; and it is said that in the third case, a hire purchase agreement, which is sandwiched between those two, that must mean a hire purchase agreement in which the tenant is the grantor, and not the grantee. That point was not taken in the county court, and, being a point of law, it is therefore not open to the appellants in this Court, and it is not competent to us to express any opinion upon it.

I assume, therefore, for the purposes of my judgment in this case that the hire purchase agreement mentioned in s. 4 of the Act may be a hire purchase agreement under which the tenant is the grantee. The agreement in this case is one under which the hirer agrees with the owners of the furniture "to pay punctually the said rent weekly commencing on March 27, 1913, and all expenses incurred in the collection of any arrears thereof," and by paragraph (*f*) of clause 1, "If the hirer does not duly perform and observe this agreement, the same shall ipso facto be determined and the hirer shall forthwith at his own expense return the said goods to the owners, and the owners shall be entitled to retake possession of the same as being goods wrongfully detained by the hirer, and for that purpose to enter upon any premises where the said goods may be. Notwithstanding such return or retaking of the said goods, the hirer shall remain liable for arrears of hire up to the date of such determination

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of this agreement." The material dates are these. The first instalment of rent became due on March 27; it was not paid. Default therefore was made on that date. It was not paid till March 31. The second instalment, which fell due on April 3, was not paid till April 5. The next instalment fell due on April 10 and was not paid till April 15. The result is that a default in the punctual payment of the rent was committed therefore on March 27 and on subsequent dates. It is contended that the words of the agreement, "if the hirer does not duly perform and observe this agreement, the same shall ipso facto be determined," mean exactly what they say, neither less nor more. If that be true, this consequence follows, that when on March 27 the tenant failed to pay punctually the rent due on that date the agreement was ipso facto determined. In my opinion that is not right. There are many grounds on which it can be shown to be wrong. Paragraph (*a*) of clause 1 of the agreement says that the hirer is to pay punctually the rent weekly commencing on March 27 "and all expenses incurred in the collection of any arrears thereof." Therefore, on March 28, 29, and 30 the agreement was still in force, because there was a contractual obligation on the hirer on each of those days, enforceable by the plaintiffs, to pay the arrears which had fallen due on March 27. No effect can be given to that stipulation if the agreement is to be treated as having been ipso facto determined on March 27. Further, after the words "shall ipso facto be determined," in paragraph (*f*) of clause 1, there follow words which impose an obligation on the hirer, after that event has happened, to return the goods, and which confer a right on the plaintiffs to retake possession of the goods, and for that purpose to enter upon any premises where the goods may be. Unless those words are still operative, the entry would be a trespass; the effect of the words is that the entry is not a trespass. That goes to show that the agreement is not determined by the mere fact that the hirer makes a default in the punctual payment of the rent. Paragraph (*f*) concludes with these words: "Notwithstanding such return or retaking of the said goods, the hirer shall remain liable for arrears of hire up to the date of such determination of this agreement." Now, if the determination be not, as I have shown it is not, an ipso

facto determination on March 27, it must, of course, be on some other and, necessarily, later date. The clause is, I think, to be read as meaning that the agreement is not ipso facto determined, but is determinable, at the option of the plaintiffs. Then after a default has been made in the payment of the rent, they may exercise the various powers given to them by the agreement, of entering the premises, of retaking the goods, and so on, and they can claim the arrears of hire up to the date of the determination de facto of the agreement.

If that be the true construction of the agreement, the only question which remains is, were the goods still comprised in a hire purchase agreement on May 15, when the landlord distrained? I apprehend that chattels remain comprised in an agreement when there is still subsisting some contractual obligation under the agreement relating to the chattels. Under this agreement there remained at the date of the distress the right of the plaintiffs to enter upon the premises and retake possession of the chattels. Even if so much of the agreement as consisted of a demise had been brought to an end by the exercise of the plaintiffs' right to determine it, the agreement was still subsisting and bound the chattels in the sense that it gave the plaintiffs certain rights as against the chattels, the right to enter the premises and to seize the chattels and to deal with them. In these circumstances it seems to me that the chattels were still comprised in a hire purchase agreement. That is what was held in the Court below, and is the whole question to be determined. In that state of things, the goods in question were goods to which s. 4 of the Act applied, that is to say, s. 4 excluded these goods from the operation of the Act, and the landlord therefore retained his right to distrain on them.

For these reasons I think that this appeal fails and should be dismissed.

PHILLIMORE L.J. I agree that the first point raised by the appellants is not open for our decision, for the reason given by Buckley L.J.

As to the second point, paragraph (*f*) of clause 1 is in these words: "If the hirer does not duly perform and observe this

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agreement the same shall ipso facto be determined," and then certain consequences are to follow. The clause does not say that the bailment shall ipso facto be determined, but that the agreement shall be ipso facto determined. Does that mean determined or determinable? It would so clearly be a disadvantage to the owners of the goods, and such an unbusinesslike proceeding, for the agreement to be determined instead of being determinable, that I think we must construe the word as "determinable" and not as "determined." That being the case, the agreement and the bailment, which is part of the agreement, became determinable at the option of the owner of the goods, and no doubt when he has manifested his determination the bailment is determined. But it is, I think, doubtful whether he has manifested his determination if he has neither actually taken physical possession of the goods nor communicated to the hirer his intention to do so. Be that as it may, we have still to consider whether these goods can be said to be comprised in a hire purchase agreement, so as to bring them within s. 4 of the Act of 1908. The case of *Hackney Furnishing Co.* v. *Watts* (1), in a Divisional Court of which I was a member, decided upon a form of agreement less advantageous to the owner that the goods remained comprised. That decision is open to review in this Court, but, as counsel for the appellants has truly said, it does not go to the length of deciding this case, because this agreement is in a different form and is more advantageous to the plaintiffs. I do not say that by apt words furnishing companies might not accomplish that which they seek to do in this class of case, but in my opinion the plaintiffs have not done it in this case. I think that these goods were still comprised in a hire purchase agreement at the date of the distress. I rest my judgment entirely upon the licence to enter upon premises to retake possession of the goods. I do not say that the fact that certain contractual rights remain, as for instance the right to payment of rent or of damages for a breach of the agreement, would necessarily cause the goods still to be comprised in a hire purchase agreement, but I do say that when any right remains in respect of the goods themselves, such as the

(1) [1912] 3 K. B. 225.

right to obtain possession of them, for which right recourse must be had to the agreement, the goods are comprised in a hire purchase agreement within the meaning of s. 4. It seems to me that this is the meaning and intention of the statute. It would be necessary for the plaintiffs to have recourse to the licence to retake possession contained in the agreement in order to get the benefit which they seek.

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For these reasons I think that the judgment of the Divisional Court was right and that this appeal must be dismissed.

PICKFORD L.J. I agree.

Appeal dismissed.

Solicitors for appellants: *Tredgolds.*

Solicitor for respondents: *W. M. Bellamy.*

F. O. R.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* KETTERIDGE.

1914 *Dec.* 7, 14.

Criminal Law—Trial—Separation of Juryman from Colleagues and from Control of Court after Summing up—Juryman in Position to converse with other Persons—Effect on Trial.

If a juror after the judge has summed up in a criminal trial separates himself from his colleagues and, not being under the control of the Court, converses or is in a position to converse with other persons, it is an irregularity which renders the whole proceedings abortive. It is not necessary or relevant to consider whether the irregularity has in fact prejudiced the prisoner, and the only course open to the Court is to discharge the jury and commence the proceedings afresh.

After the summing up by the judge, the jury upon the trial of a prisoner for felony expressed their desire to retire and consider their verdict. The Court bailiff having been duly sworn proceeded to conduct them to the jury room. One of the jurors, apparently not understanding what they were intended to do, departed from his colleagues and left the building and was absent for about a quarter of an hour, when he rejoined his colleagues, his absence apparently not having been noticed. After some deliberation the jury returned into Court and gave their verdict, finding the prisoner guilty:—

Held, that the whole proceedings were abortive and that the conviction must be quashed.

APPEAL by the prisoner Ketteridge against his conviction.

The prisoner's notice of appeal contained (inter alia) the following ground of appeal:—"When the jury were retiring to

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consider their verdict in charge of the bailiff who had been sworn in their presence in the usual way to keep them together, one of the jurors who were trying me detached himself from the other jurors and did not remain in charge of the said bailiff but, without the leave of the Court, left his colleagues and the precincts of the Court, but was subsequently, after what interval I do not know, but before the jury returned into Court, discovered somewhere and admitted to the jury room and he and the others returned into Court and gave their verdict."

The following statement of the facts is in substance taken from the judgment. The appellant was indicted before A. T. Lawrence J. on November 6, 1914, at the Chelmsford Assizes on a charge of rape and was convicted of the attempt and sentenced to six months' hard labour. His appeal was on the hearing limited to one point only, which was this. It appeared that after the summing up by the judge the jury began to deliberate in the box, but after some five or six minutes they expressed their desire to retire and consider their verdict. The Court bailiff having been duly sworn proceeded to conduct them to the jury room. One of the jurors, apparently not understanding what they were intended to do, departed from his colleagues and left the building and was absent for about a quarter of an hour, when he rejoined his colleagues, his absence apparently not having up to that moment been noticed. After some deliberation the jury returned into Court and gave their verdict, finding the appellant guilty. The exact circumstances that had occurred were not formally brought to the attention of the Court.

The appellant was sentenced to six months' imprisonment with hard labour.

C. E. Jones, for the appellant. A juryman must not separate from his fellow jurymen after the judge has summed up. If he does, it makes the whole of the proceedings at the trial bad: *Reg.* v. *O'Connell* (1); *Reg.* v. *Ward* (2); *Rex* v. *Willmont.* (3) *Rex* v. *Crippen* (4) is distinguishable. In that case the juryman was separated from his fellow jurymen during the course of the

(1) (1843) 1 Cox, C. C. 410.
(2) (1867) 10 Cox, C. C. 573.
(3) (1914) 10 Cr. App. Rep. 173.
(4) [1911] 1 K. B. 149.

trial and before the summing up. It is clear from s. 1 of the Juries Detention Act, 1897 (60 & 61 Vict. c. 18), which gives power to the Court at any time before the jury consider their verdict to permit the jury to separate, that the Legislature recognized that the jury cannot, even with the consent of the Court, separate when the summing up is concluded and they begin to consider their verdict.

Roland Burrows, for the prosecution. The absence of a juryman at the time the jury are considering their verdict is on the same footing as his absence during the trial. If a juryman separates from his fellow jurymen after they have retired, the trial is not avoided unless something in addition happens which prejudices the prisoner. It is a mere irregularity which does not cause a mistrial: *Reg.* v. *ONeill* (1); *Rex* v. *Kinnear.* (2) During the trial the jury may be discharged and another jury sworn. The juryman may have rendered himself liable to punishment for contempt of Court, but unless it is shown that he conversed with some one or the prisoner has been in some way prejudiced the trial is not avoided. A letter of explanation said to have been sent by the juryman is at the Court's disposal, but it is conceived that it is not admissible in evidence.

[The Court declined to read the letter.]

DARLING J. stated the Court's opinion that the conviction must be quashed for reasons to be expressed in a final judgment to be delivered at the next sitting of the Court.

Dec. 14. The following judgment of the COURT (Darling, Lush, and Atkin JJ.) was read by

LUSH J., who, after stating the facts, continued: Mr. Jones, on behalf of the appellant, submitted that the trial was in these circumstances abortive and that the conviction should be quashed. The Court after argument took this view and ordered the conviction to be quashed and the appellant to be discharged from custody, but as the case involves matters

(1) (1843) 3 Craw. & Dix, 146. (2) (1819) 2 B. & Ald. 462.

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of some importance we thought it better to state our reasons in writing.

Mr. Burrows, who appeared for the prosecution, contended that although the juror did what was irregular in separating from his colleagues and exposed himself to the risk of having a punishment imposed for his contempt of Court, the Court should not, in the absence of evidence that he had communicated with any other person or that the appellant had been prejudiced, treat the trial as abortive, jurors now being allowed to separate during the trial of a prisoner on a charge of felony such as this. He cited *Rex* v. *Kinnear* (1) and *Reg.* v. *O'Neill.* (2)

In the first of these cases the offence charged was a misdemeanour and the judge had not summed up, and therefore that decision does not assist us in the present case. In *Reg.* v. *O'Neill* (2), which was an Irish case, and the decision was merely that of a Court of first instance, there are dicta which appear to show that the fact that the prisoner had been prejudiced by the juror conversing with other persons was material, but the case of *Rex* v. *Fowler* (3), which was cited, does not appear to us to justify that conclusion. In our opinion it is not necessary or relevant to consider whether the irregularity has in fact prejudiced the prisoner. We refused to consider an explanatory statement which we were told had been made by the juror which would clearly not be admissible in evidence. If a juror, after the judge has summed up, in any criminal trial separates himself from his colleagues and, not being under the control of the Court, converses or is in a position to converse with other persons, it is an irregularity which, in the opinion of the Court, renders the whole proceedings abortive, and the only course open to the Court is to discharge the jury and commence the proceedings afresh. This view was adopted by the Court in *Reg.* v. *Ward.* (4) That such an act on the part of a juror is irregular and could not be sanctioned by the Court itself was recognized by the Legislature in the Detention of Juries Act, 1897 (60 & 61 Vict. c. 18). We accordingly quashed the

(1) 2 B. & Ald. 462.
(2) 3 Craw. & Dix, 146.
(3) (1821) 4 B. & Ald. 273.
(4) 10 Cox, C. C. 573.

conviction. It is of course open to the Crown to recommence the proceedings. It is for the Crown to consider whether to adopt that course or not.

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REX v. KETTERIDGE.

Conviction quashed.

Solicitor for prisoner: *Registrar of the Court of Criminal Appeal.*

Solicitor for prosecution: *Director of Public Prosecutions.*

J. E. A

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Nov. 9, 10, 11, 12, 13, 16, 17, 18; *Dec.* 14.

Police—Special Emergency—Constables borrowed from another Police Force—Chief Constable of County—Power of to bind County to pay for Maintenance of Borrowed Constables—Police Act, 1890 (53 & 54 *Vict.* c. 45), *s.* 25—*County Police Act*, 1839 (2 & 3 *Vict.* c. 93), *s.* 18.

The power of the chief constable of a county in times of emergency to strengthen his own police force by the addition of constables belonging to the police force of another police authority is not limited to cases in which his own police authority have under s. 25, sub-s. 3, of the Police Act, 1890, delegated to him the power to do so. He is by virtue of his office under a duty to preserve the peace and to protect life and property in the county, and in the discharge of that duty he may when necessary engage the assistance of outside police, and he may do so upon the terms, amongst others, of providing them with board and lodging. The cost of providing such board and lodging may, subject to examination and audit by the standing joint committee of the county, be recovered by him from the county fund under s. 18 of the County Police Act, 1839, as being "extraordinary expenses necessarily incurred by him in the execution of his duty."

TRIAL before Bankes J. without a jury of the preliminary questions of liability raised on the pleadings in two actions.

The first action was brought by the Glamorgan Coal Company against the Glamorganshire County Council, the Standing Joint Committee of the Quarter Sessions and County Council of Glamorgan, and Captain Lindsay, the chief constable of the county of Glamorgan, to recover the sum of 23,346*l.* 11*s.* 11*d.*

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for money expended by the plaintiffs on the defendants' behalf in housing and feeding large numbers of police borrowed by the defendants from other police authorities between the months of November, 1910, and July, 1911.

The second action was brought by the Powell Duffryn Steam Coal Company against the same defendants to recover a sum of 2022*l.* 7*s.* 7*d.* for money expended by the plaintiffs on the defendants' behalf for similar purposes.

The plaintiff companies were in the year 1910 the owners respectively of several collieries in the Mid Rhondda and Aberaman districts of the county of Glamorgan. In the autumn of that year there was trouble between them and their men relating to work and wages. The trouble rapidly developed, and by November 1 the whole of the men were out on strike. At that time the defendant Captain Lindsay was the chief constable of the county. He from the first anticipated serious disturbances and at once commenced drafting some of his own Glamorganshire police into the districts affected and also took the necessary steps to secure outside assistance when required. This assistance consisted of police from other counties and districts including the metropolis, with regard to whom he from time to time entered into what are known as "aiding agreements" with the police authorities of those counties and districts under the provisions of the Police Act, 1890. These agreements, of which there were twenty-nine in all, covered a period from November 4, 1910, to July, 1911. They purported to be made by Captain Lindsay on behalf of the police authority of Glamorganshire, therein called the "aided authority," and they all contained a provision that the aided authority should pay to the aiding authority for the borrowed constables, amongst other charges, subsistence allowance and lodging allowance at the rates therein specified, except in one case in which the agreement contained a note to the effect that the charges specified in the schedule thereto did not include subsistence for officers or men, leaving the amount of such charge to be determined otherwise. In consequence of these agreements a very large number of police were introduced into the district, and were employed in preserving the peace and protecting life and property. At no time were any more of such extra police

employed than was absolutely necessary. On November 2 a workmen's train was attacked by an organized body of strikers. This was the first of a series of organized attacks. On November 5 the magistrates met at Aberdare to consider the position, and they decided that having regard to the serious state of things in the Aberdare Valley the time had arrived for calling in the military, but it was left to the chief constable to decide the moment when this should be done. On November 7 the magistrates of the Mid Rhondda district gave the chief constable the same directions about the calling in of the military. On the night of the same day a serious attack was made by several thousand strikers on the power house at one of the principal collieries of the Glamorgan Coal Company. Thereupon Captain Lindsay sent a telegram summoning the military, and Mr. Llewellyn, the manager of the Glamorgan Coal Company, at Captain Lindsay's request, entered into an agreement with the proprietor of a skating rink at Tonypandy to hire it for the accommodation of the military at a weekly rent of 75*l.* In reply to Captain Lindsay's telegram the Home Secretary on November 8 telegraphed that infantry should not be used till all other means had failed, and that he had made arrangements for sending down a number of metropolitan police instead, and accordingly on that day 470 constables of the metropolitan police force were sent down, and on the following day, November 9, a further 300 were sent at Captain Lindsay's request. As the Tonypandy rink was under the circumstances not required for the military, some of the imported police were housed and fed there; others were sent to Aberaman House, an old manor-house used as colliery offices, where they were housed and fed by the Powell Duffryn Company, others were stationed at the different collieries belonging to the Glamorgan Company, while others were billeted on various hotels and public-houses in the district. The expenses thereby incurred by the two plaintiff companies were as follows: By the Glamorgan Company, for meals and other requisites supplied at the rink to the metropolitan police, 4859*l.*; ditto supplied to other police who succeeded the metropolitan in the occupation of the rink, 4587*l.*; ditto supplied to police at the different collieries of the Glamorgan Company at which they were housed and fed or fed only, 10,328*l.*; for hire of rink, 3750*l.*; by

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the Powell Duffryn Company, for meals supplied to the metropolitan police, 1538*l.*; for ditto supplied to other police, 4845*l.* The expenditure so incurred by the plaintiff companies was, as the judge found, not a voluntary expenditure, but an expenditure incurred at the request of Captain Lindsay and under circumstances which implied a promise of repayment. In making the said requests Captain Lindsay was acting in his capacity of chief constable and believed that he either had or would subsequently in due course get the authority of the standing joint committee for the repayment of the expenditure. In fact he had no antecedent authority from the standing joint committee of Glamorgan to employ any of the aiding police or to enter into "aiding agreements" with the police authorities of the various counties and districts from which the said police were drawn, except in one case, that of the police from the county of Somerset, a general authority having been given him to enter into such an agreement with that particular county in the year 1909. But the committee knew of the aiding police being so employed, and on December 12 they appointed a sub-committee to consider what liabilities the chief constable had properly incurred in connection with such police other than the metropolitan police, and authorized them to ratify what he had done if ratification was necessary. However, neither the sub-committee nor the standing joint committee ever formally ratified the chief constable's action, but the judge found that so far as a ratification by conduct could be effectual for the purpose the standing joint committee did ratify the incurring of the expenditure in connection with the police other than metropolitan. With regard to the metropolitan police the joint committee expressly repudiated their liability, as those police had been sent down by the Home Secretary against their wish in substitution for the military for whom they had asked. All the aiding police, metropolitan as well as the others, were sworn in as special constables. The plaintiffs the Glamorgan Coal Company claimed to recover from the standing joint committee and the county council the said sum of 23,346*l.* 11*s.* 11*d.*, and the plaintiffs the Powell Duffryn Steam Coal Company claimed to recover from the same defendants the said sum of 2022*l.* 7*s.* 7*d.*, as money expended by the plaintiffs respectively at the defendants' request

in pursuance of agreements made by Captain Lindsay on their behalf as their authorized agent; alternatively they claimed declarations that the said respective sums were extraordinary expenditure necessarily incurred by Captain Lindsay in the execution of his duty under the County Police Act, 1839, and that subject to examination and audit of the accounts relating thereto under s. 18 of the said Act they were entitled to have the said respective sums paid by the defendant council out of the county fund; and as a further alternative they claimed a declaration that the said expenditure had been determined by the joint committee to be required for the purposes of the police under s. 30, sub-s. 3, of the Local Government Act, 1888, and that the plaintiffs were entitled to have it repaid to them under that section out of the county fund. The claim against the defendant Captain Lindsay was an alternative claim for damages for breach of warranty of the authority of the other defendants to incur the expenditure on their behalf in the event of the claim against them being disallowed for want of such authority.

By an order of a Master dated May 8, 1914, it was "ordered that the preliminary questions of liability raised on the pleadings in the above consolidated actions be tried, reserving the question of damages to be dealt with as the Court may direct."

Clavell Salter, K.C., and *Randolph*, K.C., for the plaintiffs in the action by the Glamorgan Coal Company. Under s. 9 of the Local Government Act, 1888 (51 & 52 Vict. c. 41)(1), all the powers, duties, and liabilities of quarter sessions with respect to county police were transferred to the standing joint committee of the quarter sessions and the county council, and the county police were under s. 7 of the County and Borough Police Act, 1856 (19 & 20 Vict. c. 69)(2), bound to perform such duties as the

(1) By s. 9 of the Local Government Act, 1888, "The powers, duties, and liabilities of quarter sessions and of justices out of session with respect to the county police shall on and after the appointed day vest in and attach to the quarter sessions and the county council jointly and be exercised and discharged through the standing joint committee of the quarter sessions and county council."

(2) By s. 7 of the County and Borough Police Act, 1856, "The constables acting under" the County Police Act, 1839, and the Act of

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quarter sessions (now the standing joint committee) might require of them. Then by s. 25 of the Police Act, 1890 (53 & 54 Vict. c. 45) (1), a police authority (which expression is by s. 33 and Sched. III. of that Act defined to mean, in the case of a county, the standing joint committee) may in the event of a special emergency strengthen their police force by importing outside police by agreement with their respective police authorities, and such agreements may provide for the expenses and allowances of the constables so imported. By sub-s. 3 the police authority may delegate their power under that section to their chief constable. The riotous conduct of the strikers in the early part of November, 1910, was such an emergency as is contemplated by the section, and it would have been within the power of the standing joint committe to authorize the chief constable to enter into aiding agreements with other police authorities. Except in the case of the agreement with the Somersetshire police authorities, the standing joint committee had not by any antecedent resolution authorized Captain Lindsay to enter into any such agreement, and at the time that he made the agreement which he did it may be that he acted without authority, but the

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1856 "shall in addition to their ordinary duties perform all such duties connected with the police in their respective counties . . . . as the justices in general or quarter sessions assembled . . . . from time to time direct and require."

(1) By s. 25, sub-s. 1, of the Police Act, 1890, "Where a police authority deem it expedient for any special emergency or under any exceptional circumstances to strengthen their police force (in this section referred to as the aided force) by constables belonging to another police force, such number of constables belonging to the latter force may be added to the aided force, and for such period, as may be agreed on between the police authorities of the forces; and the constables so added notwithstanding that they have not been sworn in or taken any declaration as constables of the aided force shall during that period be deemed, save as otherwise provided by the agreement, to be for all purposes constables of the aided force and shall have the like powers and privileges."

Sub-s. 3: "Any power conferred on a police authority by this section . . . . may . . . . be delegated by that authority to their chief officer of police by any general or special order and with or without any exceptions, restrictions, or conditions."

Sub-s. 4: "An agreement under this section may contain such terms . . . . as to the expenses (including the pay and allowances of the constables so added . . . .) and otherwise as may seem expedient."

standing joint committee subsequently ratified his action by their conduct in allowing the police, after they became aware of their presence in the district, to remain there, and by continuing to enjoy the benefit of their services. On this ground they must be taken to have ratified the employment even of the metropolitan police notwithstanding that they in terms repudiated their liability to pay for their keep. Then if the expense was by virtue of such ratification incurred by Captain Lindsay as the agent of the committee, the plaintiffs are entitled to recover that expense from the committee at common law as money paid at the defendants' request, and if the propriety of any of the expenditure is disputed the amount which they are entitled to recover must be determined by a referee. If, however, it cannot be so recovered on a common indebitatus count the plaintiffs are at all events entitled under s. 30, sub-s. 3, of the Local Government Act, 1888 (1), to an order that the county council shall provide for its payment out of the county fund. Secondly, if there was no ratification by the committee of the agreements entered into by the chief constable, he is entitled to recover, for the benefit of the plaintiffs, the amount of the expenditure under s. 18 of the County Police Act, 1839 (2 & 3 Vict. c. 93) (2), as an allowance to be made to him "for extraordinary expenses necessarily incurred by him . . . . in the execution of his duty" under that Act. The expenses being due to an exceptional emergency were extraordinary within the meaning of that section, and they were incurred by Captain Lindsay in the execution of his duty under the County

(1) By s. 30, sub-s. 3, of the Local Government Act, 1888, "Any matter arising under this Act with respect to the police . . . . or with respect to anything incidental to the above mentioned matters . . . . shall be referred to and determined by the joint committee under this section; and all such expenditure as the said joint committee determine to be required for the purposes of the matters above in this section mentioned shall be paid out of the county fund, and the council of the county shall provide for such payment accordingly."

(2) By s. 18 of the County Police Act, 1839, "In addition to the salary to be paid to the chief constable of the county, reasonable allowances shall be made to him for extraordinary expenses necessarily incurred by him, and by the constables under his orders, in the apprehension of offenders, and in the execution of his and their duty under this Act, which allowances shall be examined and audited by the justices of the county in quarter sessions assembled."

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Police Act. In order to establish that they were "incurred" by him it is not necessary to show that he had actually paid them, it is enough that he was under a personal liability to pay. Further they were incurred in the execution of his duty under the Act. Under s. 6 of the County Police Act, 1839, the chief constable is to "have the general disposition and government of all the constables," which expression must be taken to include the imported police, for by s. 25, sub-s. 1, of the Police Act, 1890, "the constables so added shall" during the period of the agreement "be deemed . . . . to be for all purposes constables of the aided force." The chief constable is responsible for the maintenance and wellbeing of his force, and is therefore bound to see that the added police are properly housed and fed. Moreover all the added constables were sworn in as special constables, and accordingly were entitled under s. 13 of the Special Constables Act, 1831 (1 & 2 Will. 4, c. 41), to be paid "such reasonable allowances for their trouble, loss of time, and expenses" as the justices of the peace acting for the district should think proper, the allowances being payable out of the county fund. The expression "expenses" would include their board and lodging.

Duke, K.C., and *Willoughby Williams*, for the standing joint committee. The delegation by the joint committee to their chief officer of police of their power to enter into aiding agreements which is permitted by s. 25, sub-s. 3, of the Police Act, 1890, is a formal delegation by a general or special order and must be antecedent to the exercise of the power by the chief officer. The standing joint committee is a statutory body that can only act within the four corners of its statutory powers, and those powers only authorize an aiding agreement before it is made. The section says nothing about ratification of an unauthorized agreement made on their behalf, and the suggested ratification would be wholly inoperative. Even if this were not so the ratification would have to be by as formal an instrument as that which is required to confer an antecedent authority, and it is not suggested that any formal resolution was passed by the committee ratifying the chief constable's action. In any event the plaintiffs cannot for the purpose of recovering their expenditure

out of the county fund claim to have the question of amount referred to a referee. Sect. 30, sub-s. 3, of the Local Government Act, 1888, expressly provides that such a question "shall be referred to and determined by the joint committee." Police expenses cannot be charged upon the county fund unless the statutory procedure has been strictly followed. Nor can the expenditure in question be recovered under s. 18 of the County Police Act, 1839. It was not incurred by the chief constable in the execution of his duty under that Act or under any Act. It was not incurred by him at all, for he has not paid it; and it was no part of his duty to house and feed the police under his charge, therefore even if he did incur the expense he did not do so in the execution of his duty. The section was not intended to apply to an expenditure on a large scale such as the present, but only to small sums which the chief constable could not be reasonably expected to defray out of his salary. Moreover, if s. 18 is to be read as authorizing the chief constable to incur such expenses as these it is inconsistent with the provisions of s. 25 of the Police Act, 1890, and must be regarded as pro tanto repealed by them. As regards the claim that the imported constables were entitled under s. 13 of the Special Constables Act, 1831, to the cost of their board and lodging out of the county fund, it is contended that they were not special constables although they were sworn in as such, for there was no evidence that the preliminary conditions of s. 1 of that Act were satisfied. That section only gives the justices jurisdiction to swear in special constables when it is made to appear to them on the oath of a credible witness that riots are taking place or apprehended. There was no evidence of any information having been sworn.

Holman Gregory, K.C., and *Vaughan Williams, K.C.*, for the Glamorganshire County Council.

Roche, K.C., and *Ralph Sutton*, for Captain Lindsay.

In the second action brought by the Powell Duffryn Steam Coal Company:—

Macmorran, K.C., and *Hon. M. Macnaghten* for the plaintiffs, the defendants being represented by the same counsel as in the first action.

Cur. adv. vult.

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Dec. 14. BANKES J., having reviewed the evidence and found the facts as above set out, proceeded as follows:—

I pass now to consider the contention of the parties in the light of the facts as I have found them; and for this purpose it is convenient to divide the police the cost of whose maintenance is in question into different classes. They can be divided thus: A. Glamorgan police and county of Somerset police, with regard to the latter of whom power had been delegated by the standing joint committee to the chief constable in 1909 to enter into an aiding agreement. B. Metropolitan police. C. All other police. I have already indicated with regard to all three classes that the defendants have failed to satisfy me that the plaintiffs voluntarily incurred the expenditure they now seek to recover. On the contrary, I am satisfied with regard to all three classes that the expenditure was incurred at the request of Captain Lindsay, and under circumstances from which a promise to pay must be implied. If the doctrine of ratification applies to the standing joint committee, I am satisfied that the committee did ratify the action of Captain Lindsay in employing all the police other than the metropolitan police, and in employing them upon the terms that their expenses for board and lodging should be paid by the police authority. I have no evidence that the various aiding agreements other than the metropolitan police agreements were actually laid before the standing joint committee, but I am satisfied that the committee knew of their existence, and that they contained provisions under which the police authority undertook the obligation of housing and feeding the aiding police, and I am satisfied that the committee ratified the making of these agreements. Mr. Duke has contended that the joint committee, being a statutory body with powers limited by s. 25 of the Police Act, 1890, has no power to ratify the acts of Captain Lindsay, and that any delegation of authority to him to be of any validity must be an antecedent delegation. It would, I think, be a very unfortunate thing if the police authority had no power to ratify the acts of a chief constable done in an emergency such as this was, and I do not think that there is anything in the constitution of the committee, or in the language of the section, to exclude the operation of the doctrine. As ratification relates

back to the time when the act which is ratified was done, it follows that in my opinion the position is exactly the same with regard to all the police, other than the metropolitan police, as if Captain Lindsay had received antecedent authority from the committee to enter into the aiding agreements. This authority, in my opinion, includes an authority to make the necessary arrangements for housing and feeding the police. The result of this finding is that the police engaged under the ratified agreement are to be treated for all purposes as part of the county force: see *Reg.* v. *Rotherham.* (1) The question of whether there can be said to be any ratification by the committee of the action of the chief constable in entering into the agreements for the metropolitan police is a matter of some difficulty. On the one hand, the committee undoubtedly, as between themselves and the Home Office, repudiated the authority of the chief constable to enter into the agreements, and later on threw upon the Home Office the responsibility of withdrawing those police; but, on the other hand, the committee, by abstaining from taking any action to terminate their employment, got the full benefit of the services of these men for the county over a long and trying period. It was said during the hearing that the standing joint committee had no power to terminate the employment of these police. This raises a very important question which has not been argued, and I therefore refrain from expressing any opinion on the question of whether the committee ratified the making of the agreements for the employment of the metropolitan police.

The next point I have to consider is whether the facts bring these claims of the plaintiffs within s. 18 of the County Police Act, 1839. Under the Special Constables Act, 1831, the magistrates were empowered in certain events, which included the apprehension of riots, to appoint special constables, who took an oath in the form set out in s. 1 to serve as special constables for a particular parish or township. By s. 5 a special constable was given the powers of an ordinary constable within the entire jurisdiction of the justices appointing him, and by s. 13 a special constable's claim to reasonable allowances for trouble, loss of time, and expenses is recognized; such allowances to be made

(1) [1895] 1 Q. B. 805.

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by the justices in special session. Sect. 18 of the County Police Act, 1839, provides as follows: "In addition to the salary to be paid to the chief constable of the county, reasonable allowances shall be made to him for extraordinary expenses necessarily incurred by him, and by the constables under his orders, in the apprehension of offenders and in the execution of his and their duty under this Act." The Act containing this section is the Act which provided for the creation of a body of county police with a chief constable at their head. The appointment of the chief constable is by s. 4 vested in the Court of general or quarter sessions, to whom was also given the power of dismissal. Sect. 6 provided that the chief constable should have the general disposition and government of all the constables appointed under the Act, subject to such lawful orders as he might receive from the justices in general or quarter sessions assembled. Sect. 8 conferred upon the chief constable and the other members of the force the powers, privileges, and duties which any constable duly appointed had within his constablewick by virtue of the common law, or of any statute made or to be made, and it also provided that the provisions of s. 1 of the Special Constables Act, 1831, with certain exceptions, which included the manner in which their allowances should be paid, should be deemed to apply to the county force. Sect. 18 of the Act of 1839 is the section as to allowances which takes the place of s. 13 of the Act of 1831. Under this last-mentioned section the allowances to which special constables were entitled were for their trouble, loss of time, and expenses, while provision was made for payment of such expenses as had been incurred in providing staves or other necessary articles for the special constables without indicating to whom such payment was to be made. Under the Act of 1839, the chief constable, and the members of the county police force, are paid by salary; and s. 18 consequently, when dealing with allowances, refers only to extraordinary expenses necessarily incurred, and directs that payment for these shall be made to the chief constable, whether incurred by him or by the constables under his orders. It is, in my opinion, extremely important that this section should be given as liberal a construction as possible. In times of emergency a chief constable may be compelled to act at once

before he can have an opportunity of consulting the police authority. He may find the police authority in opposition to the views on the situation which he, with wider experience and no prejudices in favour of either side in an industrial dispute, entertains. He may find himself urged by local justices to take one course and by the police authority to take another. Unless, therefore, the statute provides some machinery by which a chief constable can recover expenses which an impartial judicial tribunal may consider to have been expenses necessarily incurred, not only will a chief constable be placed in an extremely difficult position, but in some cases the preservation of order, and the protection of life and property, may be seriously imperilled. Mr. Duke has argued that the provisions of s. 25 of the Police Act, 1890, render the contention of the plaintiffs' counsel with regard to s. 18 of the Act of 1839 untenable. I do not agree. Sect. 25 of the Act of 1890 no doubt gives the police authority an absolute discretion as to whether they will or will not delegate their authority under that section to the chief constable, and gives them an absolute discretion as to whether they will or will not themselves make aiding agreements and ratify any which have been made on their behalf; but it does not relieve the chief constable of the duties appertaining to his office, which must include, and, according to Mr. Duke's admission, do include, the preservation of the peace, the protection of the inhabitants, and the safeguarding of property within the county. It would, no doubt, be only on very rare occasions that a chief constable, or persons who have acted at his request, would have to appeal to the provisions of s. 18 of the Act of 1839 as against the action of the police authority; but there may be such cases, and this is said to be one of them. It is true that the authority to decide what expenses come within s. 18 is now the standing joint committee, to whom that duty was given as the successors, under the Local Government Act, 1888, of the justices of the county in quarter sessions assembled. The matter is not one, however, in which the standing joint committee have any discretion. The duty which has passed to them is to decide in a judicial manner whether the expenses claimed come within the section, and, if so, to examine and audit them. In order to come within the section, the expenses claimed

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must fulfil certain conditions. They must be extraordinary, they must be necessarily incurred, they must be incurred by the chief constable or by the constables under his orders in the execution of his or their duties. Do the expenses claimed by the plaintiffs fulfil the conditions? In my opinion they do. They were extraordinary in the sense that they were expenses not covered by the chief constable's salary, or expenses over and above the ordinary police expenditure of the county, whichever meaning is attached to the word "extraordinary"; they were necessary both in the sense that the employment of all the police concerned was necessary to preserve order and to protect life and property, and that their services could not have been obtained except upon the terms of paying for their board and lodging, and also in the sense that no person was legally liable to pay for their board and lodging apart from any arrangement or contract made by the chief constable to pay them. Were they, then, expenses incurred by the chief constable? Is it necessary, to bring any particular claim within the section, that the chief constable, or the constables, should have discharged the obligation before making any claim? I think not. Is it, then, necessary that the chief constable or constable should have pledged his personal credit for the amount claimed? I think not. The language is very general, and I think that a chief constable is entitled to claim payment under this section in a case where either the chief constable or the constable has at the time of giving an order stated that he did not intend to pledge his personal credit, but the matter was one for which the police authority would in due course pay.

The one remaining question with which I have to deal is whether the expenses were incurred by the chief constable in the execution of his duty. It was clearly the duty of the chief constable to make the necessary provision for the housing and feeding of all the police who were properly employed under his orders in the disturbed area. Having regard to what I have already said, all the police, whether county police or aiding police, other than metropolitan police, would come into this category. With regard to the metropolitan police, I have not to deal with a case where police were employed by a chief constable

contrary to the instructions given him by his police authority. In the present case the only objections the police authority ever raised with regard to the metropolitan police were: (1.) to their being sent in place of military; (2.) to their expenses being thrown upon the county. No objection was ever raised to their being employed by the chief constable; and, having regard to the fact that other police would have had to be substituted for them at the expense of the county had they returned to London, it is not surprising that objection was not raised. Under these circumstances, it seems to me clear that it was the duty of the chief constable, so long, at any rate, as he continued to avail himself of their services, to provide for their housing and maintenance, and to incur any necessary expense for that purpose. It would not alter my opinion on this point, having regard to the exceptional circumstances, even if Mr. Duke had succeeded in convincing me that these men were not properly sworn in as special constables and were not being properly employed as police at all. The dicta of Vaughan Williams L.J. in *Reg.* v. *Glamorgan County Council* (1) indicate, I think, that the Lord Justice was prepared to take the same view of the section as I have taken.

It has not been suggested during the argument that the Government were under any obligation to pay the expenses of the metropolitan police, and it was explained that in the cases where the Government made payment it was because public complaint had been made that the county authorities were refusing to pay small people upon whom the police had been billeted the cost of so doing. The fact that Captain Lindsay is not the plaintiff in these actions presents no difficulty to my mind, as he is a party to the actions. Had he not been a party, it might have been necessary to join him as a defendant, if he refused, as doubtless he would refuse, to be added as a plaintiff; but as he is a defendant already, the plaintiffs are, in my opinion, entitled to enforce their claims in the actions as at present constituted.

Another point that was argued had reference to the meaning of the word "determined" in s. 30, sub-s. 3, of the Local Government

(1) [1899] 2 Q. B. 536, at p. 548.

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Act, 1888. In my opinion the committee can determine an "expenditure to be required" within the meaning of the subsection without ascertaining the exact amount of that expenditure. The result, therefore, is that in my opinion the standing joint committee have come to a determination upon the subject-matter of all the expenditure in question in these actions except that relating to the metropolitan police. I may add, however, that in my opinion it is not material to the plaintiffs' cause of action whether the committee have or have not come to a determination, as I regard the action in its nature as an action asking that the committee may be ordered to determine, if they have not already done so, what sums are properly payable to the plaintiffs.

I have, I think, now dealt with all the points raised so far as they relate to the standing joint committee, and as, in my view, the plaintiffs have established a right of action against the standing joint committee, their action against Captain Lindsay fails, and I need not express any opinion upon the points raised by his counsel.

For the county council it was argued that they ought not to have been joined as parties, and that no judgment can be entered against them. I do not agree with this contention. The standing joint committee is a very special body, and its relations to the county council are also special. They are entirely regulated by statute. By s. 9 of the Local Government Act, 1888, the powers, duties, and liabilities of quarter sessions, and of justices out of session, were vested in the quarter sessions and the county council jointly, but were to be exercised and discharged through the standing joint committee. By s. 30 of the same Act it is provided that any matter arising under that Act with respect to the police, or to anything incidental to the police, or any matter requiring to be determined jointly by the quarter sessions and county council, shall be referred to and determined by the joint committee, and that all such expenditure as the joint committee determine to be required for the purposes of the above matters shall be paid out of the county fund, and the council of the county shall provide for such payment accordingly. The result is that the standing joint committee exercise and discharge powers, duties, and liabilities which are vested in the

county council and the quarter sessions jointly; but the county council are directed to provide for payment out of the county fund of all expenditure which the joint committee may determine to be required for the purposes mentioned in s. 30. The county council are no doubt powerless in any case where the standing joint committee have, acting within their powers, determined that any expenditure is required. Their privilege then is merely to pay, as was said by Cave J. in *Ex parte Somerset County Council.* (1) The case, however, is very different where the standing joint committee exceed their powers. In such a case it is, I think, quite competent for the county council to challenge any determination of the joint committee on the ground that it is ultra vires, and to refuse to provide for payment in consequence. The present is a case in point. Mr. Duke's contention is that if the standing joint committee have ratified the action of the chief constable, their action was ultra vires. In my judgment the contention is not correct; but had not the county council been made parties to this action they could have litigated the question all over again had the plaintiffs attempted to enforce my judgment against them. I think that the plaintiffs were entitled, under Order xvi., r. 4, and Order xxv., r. 5, to join the county council as defendants.

I have now, I think, covered all the questions of liability raised on the pleadings, which is the first thing which by the order of March 8, 1914, I was directed to do. The order which was made after hearing the solicitors, and by consent, went on to direct that the question of damages should be dealt with as the Court might direct. It appeared to be evident that the word "damages" had been inadvertently inserted in the order, as, if read strictly, the order would have no application except in the event of my decision being adverse to Captain Lindsay, and would be confined to this case alone. I suggested an amendment of the order, but, to my surprise, the county authorities refused to give any consent. At first I was inclined to think that I must construe the word "damages" in its strict meaning, but further consideration has satisfied me that that view was wrong, and that I ought to have greater regard to the clear intent of the parties than to any

(1) (1889) 58 L. J. (Q.B.) 513.

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particular words which they may have used in the expression of their intent. (See per Parke B. in *Ford* v. *Beech* (1); *The Niobe.* (2)) I consider, therefore, that I am competent to deal with the question of amount. In the first place I decide in favour of the plaintiffs against the defendants the standing joint committee and the county council in both actions, with costs, on all questions of liability raised on the pleadings. I make a declaration that the said sums of 23,346*l.* 11*s.* 11*d.* and 2022*l.* 7*s.* 7*d.* were extraordinary expenditure necessarily incurred by the defendant Lindsay in the execution of his duty under the County Police Act, 1839, and that the defendant Lindsay is entitled to the payment of the said two sums out of the county fund subject to examination and audit by the joint committee, and that the defendant council subject to such examination and audit are bound to pay the said sums to the defendant Lindsay for the use and benefit of the Glamorgan Coal Company and the Powell Duffryn Steam Coal Company respectively, and I give judgment for the defendant Lindsay in both actions.

Judgment for the plaintiffs in both actions against the joint committee and the county council. Judgment for the defendant Lindsay.

Solicitors for plaintiffs: *Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

Solicitors for the standing joint committee and the county council: *Smith, Rundell & Dods, for Morgan, Bruce & Co., Pontypridd.*

Solicitors for Captain Lindsay *Broad & Co.*

(1) (1848) 11 Q. B. 852, at p. 866. (2) [1891] A. C. 401, at p. 408.

J. F. C.

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Bread—Sale otherwise than by Weight—London Bread Act, 1822 (3 *Geo.* 4, *c. cvi.*), *s.* 4.

A baker's man being asked by an intending purchaser for a loaf of bread produced a loaf and said the price was 2¾*d.* He handed the loaf to the purchaser in a paper bag on which was printed a notice that the loaf was sold as weighing 1¾ lbs., but the purchaser did not read the notice or know that any condition was printed on the bag. The purchaser then paid the price. Nothing was said by either party about the weight of the loaf, but the purchaser expected to get a 2 lb. loaf as 2¾*d.* was the ordinary price of a loaf of that weight. The loaf had been weighed by the baker before it left the bakery, and in fact weighed more than 1¾ lbs. but less than 2 lbs. Upon an information under a statute which prohibits the sale of bread otherwise than by weight:—

Held by Rowlatt and Atkin JJ. (Lush J. doubting), that a sale by weight means a sale under a contract of which it is a term that the subject-matter is of a particular weight with reference to which the price is calculated, and that the mere fact that the seller has previously weighed the loaf and intends to sell it as of the weight so ascertained does not make the sale a sale by weight unless he communicates that intention to the buyer.

Semble per Lush J. that it is sufficient to satisfy the statute if the seller, having weighed the bread, intends to sell by the ascertained weight, whether the buyer knows of that intention or not.

Case stated by justices of Surrey.

An information was laid by the respondent, a county inspector for the county of Surrey, against the appellants charging that they within ten miles of the Royal Exchange caused to be sold to one Albert Sheath a loaf of bread otherwise than by weight, contrary to s. 4 of the London Bread Act, 1822. (1)

(1) By s. 4 of the London Bread Act, 1822 (which is in the same terms, except as to its geographical limits, as those of the general Bread Act, 1836 (6 & 7 Will. 4, c. 37)), "All bread sold within the limits aforesaid"—that is to say within the city of London and its liberties, the weekly bills of mortality, and ten miles from the Royal Exchange—"shall be sold by the several bakers or sellers of bread respectively within the said limits by weight; and in case any baker or seller of bread within the limits aforesaid shall sell or cause to be sold bread in any other manner than by weight" he shall be liable to a penalty.

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At the hearing of the information the following facts were proved or admitted. On April 27, 1914, about 3.40 P.M., Albert Sheath, a person in the employ of the respondent, saw a bread van belonging to the appellants in charge of one Drew, a roundsman in the appellants' employ, in Kew Gardens Road, Kew. Sheath asked Drew for a loaf of bread and expected to buy a 2 lb. loaf. Drew served Sheath with a loaf for which Sheath paid $2\frac{3}{4}d.$, having previously inquired of Drew the price. Drew did not weigh the loaf and was never asked to do so by Sheath, but he placed it in a paper bag which he took from the van. Upon the bag was printed the following words:—"Notice. To provide for variations from original weight by evaporation or otherwise we sell each of these loaves as weighing $1\frac{3}{4}$ lb. Our servants are instructed to weigh bread when desired. The shape of our loaves in no sense indicates any customary or standard weight. Bread is sold only from the van except to regular customers." Drew did not call the attention of Sheath to that notice on the bag, and Sheath never read the notice. Sheath had never bought bread from the appellants before and had never heard of such a notice. On one side of the van there was the following notice in large type:—"Delivered daily in this district Lyons' unrivalled bread $2\frac{3}{4}d.$," but it contained no reference to the weight of the loaf. The said loaf is a very common shape of household bread, is sold by every baker, and is known as a "coburg" loaf. The current price on that day in Richmond and elsewhere for a 2 lb. loaf was $2\frac{3}{4}d.$ One Frank Emery, a person in the employ of the respondent, received the loaf in the bag from Sheath and asked Drew if he had weighed it. Drew replied, "It has not been weighed since it left Cadby Hall"—the appellants' bakery—"this morning, we simply put it into one of these bags." Emery then weighed the loaf and found that it weighed 1 lb. 13 oz. 4 drs., or 2 oz. 12 drs. less than 2 lbs. Drew then called the attention of Emery to the notice on the bag, but admitted that he had not called the attention of Sheath to the notice. The appellants employ about 180 roundsmen in charge of vans for the purpose of selling bread mainly to regular customers in various parts of London and the suburbs daily. Many thousands of loaves of a similar kind were sold every day by the appellants and were supplied in paper bags

bearing a similar notice. The practice at the appellants' bakery was for the dough to be weighed at 2 lb. 3 oz. before baking, and after baking such loaf was weighed by machinery at a weight well over $1\frac{3}{4}$ lbs. No loaf of exactly $1\frac{3}{4}$ lbs. or less was sent out, but was rejected in the appellants' bakery. The custom of selling loaves as of a minimum weight of $1\frac{3}{4}$ lbs. although the loaves weighed an ounce or two over such minimum weight had been adopted for the last seven years by the appellants. Regular customers were supplied with a weekly book of account in which a notice similar to that on the paper bags was printed; and on each side of the basket used for carrying bread from vans to the customers' houses a similar notice appeared on an enamelled iron plate. The roundsman had no authority to sell bread in any other manner than in accordance with the notice on the paper bags.

On the part of the respondent it was contended that as the terms of the notice on the bag had not been brought to the mind of Sheath, who had never heard of any such notice and had not read it, and as he expected to buy a 2 lb. loaf and paid the current price for a 2 lb. loaf, the above facts constituted a sale of the loaf in a manner other than by weight within the meaning of the Act.

On the part of the appellants it was contended that as the dough and the baked loaf were weighed by them that morning in view of the contemplated sale of the loaf during the day, and the weight was so ascertained to be more than $1\frac{3}{4}$ lbs. and weighed more than $1\frac{3}{4}$ lbs. at the time of the sale, and a notice that the loaf was sold as of that weight was supplied to Sheath at the time of the delivery of the loaf to him, no offence against the Act had been committed by the appellants.

The justices were of opinion that the offence as charged against the appellants had been committed by them, and they accordingly convicted them.

Bodkin, for the appellants. If it were necessary in order to establish the appellants' contention that they sold the loaf as weighing $1\frac{3}{4}$ lbs. that they should have given the purchaser notice of the weight, they did so. The printed statement on the wrapper

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was enough for that purpose. It was not contended by the purchaser that he did not see there was printed matter on the paper, but only that he did not read it; but that is immaterial. In *Batchelour* v. *Gee* (1), a case under the Sale of Food and Drugs Act, where a pot of cream was sold in a pot bearing a label stating that it was mixed with boric acid, and the pot was put into a paper bag so that the purchaser could not see the label, it was held that the seller had committed an offence. But Avory J. said, "If the fact that there was a label had been brought to his mind I agree that the seller would not be bound to go further and prove that the person receiving the article actually read the label." It is the purchaser's own fault if seeing that there is a notice he does not read it. But it is unnecessary under the London Bread Act, 1822, that even an opportunity of reading a notice stating the weight of the loaf sold should have been given to the purchaser. The Act requires that bread sold by bakers "shall be sold by weight." That does not mean that it shall be weighed at the time of the sale, and though the baker's cart is required by s. 9 to be provided with scales, he is under no obligation to use them unless required to do so by the purchaser. But although the Act does not in terms say that the bread must in all cases be weighed by the seller previously to the sale, the Courts have held that such a weighing is a necessary condition of a sale by weight: *Jones* v. *Huxtable* (2); *Reg.* v. *Kennett.* (3)

[ROWLATT J. If that is so, then if the seller instead of weighing a loaf guesses its weight to be 2 lbs., and tells the buyer that he is selling it as a 2 lb. loaf, and the buyer buys it as such, and upon its being subsequently weighed it proves to be 2 lbs., the seller has nevertheless committed an offence.]

The authorities seem to go that length. With reference to such weighing the Courts have laid down the following further propositions:—What is to be weighed is the baked bread, it is not sufficient to weigh the dough before baking: *Jones* v. *Huxtable* (2); *Hill* v. *Browning* (4); *Slater* v. *Brewsters.* (5) Not only must the baked bread be weighed, but it must be weighed with reference

(1) [1914] 3 K. B. 242.
(2) (1867) L. R. 2 Q. B. 460.
(3) (1869) L. R. 4 Q. B. 565.
(4) (1870) L. R. 5 Q. B. 453.
(5) [1905] 2 I. R. 258.

to the sale. Therefore where a loaf was weighed just after it had come out of the oven, and being misshapen was put on one side, and twelve hours afterwards was sold by mistake to a purchaser when, owing to evaporation in the interval, it had lost 1½ oz. of its ascertained weight, it was held not to have been sold by weight. Further, each loaf must be weighed singly. It is not enough to weigh the loaves in batches of three and then sell each loaf as being one-third of the total weight: *Welch* v. *Cutler*. (1) Further, not only must each loaf have been weighed, but it must be sold by the true weight so ascertained. The seller commits an offence against the Act, and not merely against the general law, if having ascertained the loaf to be of one weight he sells it as being of a greater weight: *Cox* v. *Bleines* (2); *Houghton* v. *Buxton*. (3) This is admittedly in conflict with what was said by Blackburn J. in *Jones* v. *Huxtable* (4): "The offence is selling otherwise than by weight, and had there been a sale in terms of a 4 lb. loaf, and if by mistake, or even if intentionally, it had turned out deficient in weight, the seller would have incurred no penalty, the statute not making this an offence." But that dictum must be regarded as overruled. It is enough if the loaf has been weighed before sale and found to weigh at least as much as the weight at which it is sold. That it in fact weighs more is immaterial: *Bridge* v. *Passman*. (5) The essential part of a sale by weight for the purposes of the Act is that the loaf should have been weighed before sale in the manner indicated by the above-mentioned cases, and that the seller should have fixed his price by reference to the weight so arrived at. But, provided that the seller has done that, it is not necessary that he should have communicated that weight to the buyer: *Blackledge* v. *Bolshaw*. (6) There the facts were almost identical with those in the present case. The customer asked for a 3*d*. cottage loaf. Nothing was said by either party about the weight, but a loaf was handed with a paper band on it stating that it was sold at "2*d*. per lb.," in other words that it weighed 1½ lbs. It had in accordance with the practice of the bakery been previously weighed

(1) (1905) 69 J. P. 149.
(2) [1902] 1 K. B. 670.
(3) (1907) 24 Times L. R. 200.
(4) L. R. 2 Q. B. at p. 464.
(5) (1903) 68 J. P. 129.
(6) (1908) 99 L. T. 60.

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and it proved to be over 1½ lbs. There was no evidence that the purchaser had any knowledge of the statement on the band; indeed the seller did not so contend. But the Court held that there was a sale by weight. Lord Alverstone C.J. said: "There was no necessity to put the band round it at all. The placing of the band upon it did not indicate to the purchaser that the weight had been ascertained. It is not necessary to tell the purchaser that, if in fact its weight had been ascertained." The section deals only with what is to be done by the seller, it says nothing about the buyer; it requires the seller to sell by weight, not the buyer to buy by weight.

Cecil Whiteley, for the respondent. The Act compels the baker to sell by weight, and that he cannot do unless the buyer also buys by weight. A sale is a contract which involves that both parties are assenting to the same thing. Here the buyer did not assent to the sale and purchase of a 1¾ lb. loaf, for he thought he was buying a 2 lb. loaf. If there was any sale by weight at all the justices have found that it was a sale of a 2 lb. loaf, apparently upon the ground that the appellants by selling a loaf at the current price of a 2 lb. loaf must be taken to have represented to the buyer that that was its weight; and if the sale was of a 2 lb. loaf it was not a sale by the true weight, and according to the cases of *Cox* v. *Bleines* (1) and *Houghton* v. *Buxton* (2) that would be an offence against the Act. There is no authority for the proposition that the statute is satisfied if the seller has weighed the loaf with reference to the sale but does not tell the buyer what weight he is contracting to sell. In *Blackledge* v. *Bolshaw* (3) the justices thought that the seller committed an offence if having contracted to sell a loaf of at least a certain specified weight he in fact delivered one weighing a few ounces more. That case decides nothing more than that that view is wrong, and that the Act was only intended to prevent the buyer from getting less than he bargained for. Here the printed statement on the wrapper was not sufficient notice to the buyer of the weight of the loaf. The seller did not do what was reasonably necessary to bring it home to the mind of the buyer. He should

(1) [1902] 1 K. B. 670. (2) 24 Times L. R. 200.
(3) 99 L. T. 60.

have directed his attention to the terms of the notice, or have told him what was the weight he was professing to sell.

Bodkin in reply.

LUSH J. This case raises a question of considerable difficulty, a difficulty which is largely due to the fact that it is hard if not impossible to reconcile the various decisions that have been cited to us upon the Act under which this information was laid. [He stated the facts as set out in the case.] Now upon those facts the question is whether the appellants have been properly convicted of selling bread in some "other manner than by weight" in contravention of s. 4 of the London Bread Act, 1822. The respondent contended that as the terms of the notice on the bag had not been brought to the mind of Sheath, who had never heard of such a notice and did not read it, and that as he expected to buy a 2 lb. loaf, the facts constituted a sale in a manner other than by weight. The appellants on the other hand contended that as the loaf after baking had been weighed in view of the contemplated sale, and a notice specifying the weight so ascertained had been supplied to Sheath at the time of delivery, no offence had been committed. It seems to me that the statement in the respondent's contention with regard to what his expectation had been before the sale is a statement of something which was wholly irrelevant and had nothing to do with proof of the offence. If the justices had been invited to find that not only had Sheath expected a 2 lb. loaf, but that the appellants knew that he expected a 2 lb. loaf, and that they when selling the loaf passed it off as weighing 2 lbs., it might have been a material averment. But there was no such finding or contention. The contention was confined to what the buyer expected, and I cannot see how the undisclosed expectation in the mind of one of the parties to the contract can affect the obligations of the other party, or impose a liability on the seller which would not have been imposed if that undisclosed expectation had never existed. The justices have stated the existence of the expectation as though it were a material fact, and have not dealt with it except by finding generally that the offence charged had not been proved. When one turns to the section, if it had not been for the irreconcilable decisions to

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which I have referred I should not, speaking for myself, have thought there was any very great difficulty in construing it. The offence is the sale of bread by a baker in any other manner than by weight. He must make the weight of the bread the basis of the price asked for it, and in order to enable him to do that it is I think essential that he should have weighed the bread. That is the view which has been taken in a large number of the decisions cited to us, in which the actual weighing by the seller has always been dwelt upon as a condition of his immunity from liability under the Act. He must ascertain the weight of the loaf, and fix the price according to that weight. The obligation is one put upon the seller; the buyer is not referred to in the section. It has indeed been contended that the provision that the seller must sell by weight means that he must make a contract with the buyer by weight, and that on every occasion on which a buyer asks for a loaf he must inform him that he sells it by weight and specify what that weight is. In order to see if that contention is right it is necessary to examine the authorities. The first case cited to us was *Jones* v. *Huxtable* (1), the decision in which has been treated by the Courts down to the present time as correctly expounding the law. There the practice of the appellant's bakery was to weigh the dough, not the bread, the consequence of which was that as the weight shrank in the baking there was no real weighing of the bread at all. The customer asked for a quartern loaf, and a loaf was handed to him, for which was asked and paid the current price for a 4 lb. loaf. On being weighed it proved to be less than 4 lbs. It was held that the appellant was rightly convicted of selling the bread otherwise than by weight. Blackburn J. said. "The statute in question enacts that no bread shall be sold except by weight; it does not in terms say that the bread shall be weighed before or on the sale, although that would seem to be necessary in order to comply with the statute. . . . . Here the magistrate says that on the sale of this loaf there was no weighing, and no statement of a charge of so much per pound, but a demand and payment of so much for the quartern loaf, which turns out deficient in the weight which a quartern loaf is understood to

(1) L. R. 2 Q. B. 460.

weigh. The offence is selling otherwise than by weight, and had there been a sale in terms of a 4 lb. loaf, and if by mistake, or even if intentionally, it had turned out deficient in weight, the seller would have incurred no penalty, the statute not making this an offence." He there clearly said that the statute did not compel delivery of the true weight stipulated for. A man who delivers what is not in fact the stipulated weight may none the less be selling by weight. That was the view of Blackburn J., and if I may say so it is also my own. Shee J. said: "The statute does not compel a seller to weigh the bread at the time of sale, but in order to sell by weight it was incumbent on the appellant to ascertain before selling that what is understood as a 4 lb. loaf was a 4 lb. loaf"; and Lush J. said: "I do not see how a man can sell by weight an article, called a quartern loaf and which may be expected to weigh 4 lbs., but which has never been weighed, without weighing it at the time of sale." In *Hill* v. *Browning* (1) the same point was decided, that as there had been no weighing of the bread after baking the seller had not sold by weight. The cases of *Reg.* v. *Kennett* (2) and *London County Council* v. *Read* (3) are also authorities for the proposition that if there has been no weighing of the bread by the seller there can be no selling by weight within the meaning of the section. Then came the case of *Cox* v. *Bleines* (4), where the seller's servant, having been asked for a half-quartern loaf, served the customer with some bread which was placed in the pan of a pair of scales in the opposite scale of which there was already a 2 lb. weight; the beam of the scales did not move, so that the weight of the bread was not ascertained beyond the fact that it clearly weighed less than 2 lbs. On being taken away by the purchaser and weighed it was found to be 5 oz. short of 2 lbs. It was held that the seller had committed an offence under the section upon the ground that there had been no previous ascertainment of the weight. But Channell J. in the course of his judgment, speaking of the decision in *Jones* v. *Huxtable* (5), said: "It shows that this section has been judicially interpreted to mean

(1) L. R. 5 Q. B. 453
(2) L. R. 4 Q. B. 565.
(3) [1900] 1 Q. B. 288.
(4) [1902] 1 K. B. 670.
(5) L. R. 2 Q. B. 460.

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that each particular loaf must be sold according to the weight of that particular loaf—that is to say that selling by weight in the statute means selling by the true weight of the bread sold, and it follows that it is contrary to the meaning of the section to do what has been done here, whether it was owing to fraud, or to an accident, or to carelessness on the part of the person selling; the loaf was not sold according to its true weight, but was sold as being a 2 lb. loaf when it was in fact 5 oz. short." That passage, if interpreted to mean that the section requires a true delivery of the weight asked for, seems to be in conflict with the judgment of Blackburn J. in *Jones* v. *Huxtable* (1), although that case is cited with approval. I do not think, however, that Channell J. meant anything more than that the weight must be truly ascertained. The seller must take the true weight in the sense that he must really and truly weigh it. If he does really and truly weigh the loaf before selling it and bases his price upon the weight so ascertained I incline to the view that he commits no offence against the section even if he does not give any notice to the purchaser what the weight is on which the price is based. It is, however, unnecessary to decide that here, as I think that, in view of the notice on the paper wrapper which was handed to the purchaser with the loaf, there was evidence on which the justices ought to have found that the appellants had given him reasonable notice of the actual weight of the loaf that he was buying, and therefore that no offence had been committed.

ROWLATT J. In order to comply with the requirements of this statute a baker must sell by weight, and that is all that the statute says. If it had not been for the cases I am bound to say I should have been of opinion that that was not a difficult phrase to construe. Selling by weight is selling under a contract of which weight is a term, selling at a price which by contract between the parties varies with the weight of the article sold. But it has been suggested before us to-day that several refinements, or perhaps I should say excrescences, upon that simple proposition have been introduced by the authorities. It is said

(1) L. R. 2 Q. B. 460.

that although a baker contracts with his customer for bread at so much per lb. as clearly as he can, nevertheless if the bread has not been actually weighed the sale ceases to be a sale by weight, though according to its very terms it is so. Secondly it is said that where he in terms sells the loaf as being of a particular weight, if upon delivery it turns out on a subsequent investigation to be of less than the stipulated weight, the sale is not a sale by weight, though by the express terms of the contract it was declared to be so. Thirdly it has been suggested on the other side that if a baker sells bread without the weight being mentioned by either of the parties, and although there is nothing in the surrounding circumstances from which it can be inferred that the parties agreed that the sale should be of a particular weight, nevertheless he is selling by weight if in the privacy of his own establishment he has weighed the bread in view of the sale and in his own mind arrived at the price he should charge by reference to that weight. Those are very considerable excrescences upon the Act of Parliament, but we have to deal with the authorities as we find them. Now the first case referred to was *Jones* v. *Huxtable*. (1) There the customer asked for a quartern loaf. It was not found in the case that a quartern loaf meant a 4 lb. loaf, though there are some expressions which show that it was so understood. The justices found that the sale was not a sale of 4 lbs. of bread but was a sale of a loaf not by weight. Blackburn J. said it was a question of fact, and the Court upheld the decision of the justices. But one thing is clear, that all the judges there held that the statute could not be complied with unless the sale was by reference to the weight as a matter of contract. That case can never be cited for the proposition that a previous domestic weighing can make a sale a sale by weight if nothing as to weight passes, expressly or impliedly, between the seller and purchaser. They all clearly thought that there can be no sale by weight unless the weight is a term of the contract. In that case there had been no weighing of the baked loaf, and taking that consideration coupled with the want of a finding that a quartern loaf definitely meant a 4 lb. loaf, I understand the judges as saying that it was open to the justices to find that the

(1) L. R. 2 Q. B. 460.

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seller was not purporting to sell 4 lbs. of bread as such. From that mode of dealing with the case has arisen the rule that where there has been no weighing the seller cannot be heard to say that he was selling by weight although he may have directly purported to do so. That rule is traceable through a long line of cases of which *Welch* v. *Cutler* (1), *Mattinson* v. *Binley* (2), and *Cox* v. *Bleines* (3) are instances. Then there is the second excrescence to which I have referred, that a delivery of less than the stipulated weight will prevent the sale from being a sale by weight. For that *Cox* v. *Bleines* (3) and *Houghton* v. *Buxton* (4) are authorities. However, that construction of the statute, although severe, is not unreasonable, because selling consists not merely in making an executory contract, but in making the contract and at the same time handing over the thing sold. It may be that if you sell bread at so much per lb. and receive more money than you ought to having regard to the number of pounds delivered you are not selling by weight. At any rate it has been so held. But there is no case, so far as I know, which gives the least colour to the suggestion that if you have not purported, expressly or impliedly, to make the weight a term of the contract, the sale will become a sale by weight merely because you happen to have privately weighed the bread and in your own mind fixed the price by that weight. In every case in which the question whether there has been a weighing or whether there has been a shortage in the weight delivered has been gone into as relevant to the question whether an offence has been committed or not, there has been evidence that the parties intended the weight to be a term of the contract, as for instance where a quartern loaf has been asked for, or a price has been asked which in the district suggested a particular weight. If that is a true view of the statute as it stands interpreted by the authorities, what conclusion are we to arrive at here? It is clear that the justices have found that the purchaser was not affected by notice of the statement on the bag, and reasonably so, for you do not expect to find the terms of a contract on a baker's paper bag. It is not like the case of a passenger ticket on which conditions

(1) 69 J. P. 149.
(2) [1908] 2 K. B. 534.
(3) [1902] 1 K. B. 670.
(4) 24 Times L. R. 200.

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are not unusually found. I think it was well within the power of the justices to find that the purchaser here was not bound by a contract the terms of which were found only on the paper bag. But it may be that the justices also intended to find that what the purchaser contracted for was a 2 lb. loaf. The evidence to support such a finding is very slender, because it only amounts to this, that he paid for a loaf the sum which was the current price of a 2 lb. loaf in that neighbourhood, and therefore he may have supposed that he was getting a 2 lb. loaf. What he supposed is, taken by itself, immaterial; but it may be that from that fact coupled with other circumstances it could fairly be inferred that the bargain was for a 2 lb. loaf, which he did not get. But whether the justices did so find, or whether they merely found that the purchaser had no notice of what was printed on the paper bag, in either case there was evidence to support their finding, and in either case the seller had committed an offence against the statute. I think the conviction should be affirmed.

ATKIN J. By this statute a baker must not sell bread otherwise than by weight, and it appears to me that that means that it must be a term of the contract of sale that the seller sells and the purchaser buys so many pounds or ounces of bread in the particular loaf that is sold. The only question in this case is whether that was a term of the contract for the sale of this particular loaf. It is said that the statute is satisfied if the seller, although he does not make it a term of the contract with the purchaser that the sale is by weight, has in fact previously weighed the bread. It seems to me that that in itself cannot make the subsequent transaction of sale a sale by weight. Then was there evidence here that the weight of the loaf was not a term of the contract? for the justices have found that the sale was not by weight. The findings of fact were that the purchaser asked for a loaf and was handed the loaf in question, nothing being said by either party about the weight, but at the time the loaf was so handed to him it was wrapped in a paper bag bearing a notice that the loaf weighed $1\frac{3}{4}$ lbs. The justices have found that he did not read that notice and had no knowledge of it, and that under those circumstances the notice did not constitute one of the terms of the contract. It appears

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to me that for the purpose of determining whether or not a written notice was a term of the contract, in a sale of a loaf as in any other contract, one must be guided by the principles laid down by Mellish L.J. in *Parker* v. *South Eastern Ry. Co.* (1) He said (at p. 423): "I am of opinion therefore that the proper direction to leave to the jury in these cases is, that if the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; that if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering of the ticket to him in such a manner that he could see there was writing upon it, was, in the opinion of the jury, reasonable notice that the writing contained conditions." Those rules were affirmed as being the right rules by the House of Lords in *Richardson* v. *Rowntree*. (2) Here the justices have found that though the purchaser may have seen that there was writing on the paper wrapper no reasonable notice was given to him that that writing contained any of the terms of the contract. That is sufficient to dispose of the case, and it is not necessary in my view to consider the further question as to whether a sale by weight does not mean a sale by the true weight, but inasmuch as that question has been argued I wish to express my opinion upon it. I think that we are bound by the judgment of Channell J. in *Cox* v. *Bleines* (3) and the decision of the Court in *Houghton* v. *Buxton*. (4) In both those cases it was held that as the actual weight of the loaf was not what it professed to be an offence had been committed under the statute. No doubt those decisions are in direct conflict with the dictum of Blackburn J. in *Jones* v. *Huxtable* (5), but that dictum was only obiter and must be taken to have been overruled by them. If the statute does not require the sale to be by the true weight, it is difficult to see what reason there could be for requiring a preliminary weighing at all, and that it does

(1) (1877) 2 C. P. D. 416.
(2) [1894] A. C. 217.
(3) [1902] 1 K. B. 670.
(4) 24 Times L. R. 200.
(5) L. R. 2 Q. B. 460.

require such a preliminary weighing is well established by the authorities. There is one other matter that I wish to refer to, namely, the contention that the justices improperly considered the state of mind of the purchaser in expecting to get a 2 lb. loaf. It appears to me that that expectation, even though unexpressed, might have been very relevant to the question whether or not the purchaser was in fact affected with notice of what was on the wrapper. If a man came expecting to get a 2 lb. loaf and that which was supplied was as to price and apparent size such as would conform to his expectation it would be all the more easy for the justices to find that he had no notice that what he was in fact getting was not a 2 lb. loaf.

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Appeal dismissed.

Solicitors for appellants: *Bartlett & Gluckstein.*

Solicitors for respondent: *Wyatt & Co., for T. W. Weeding, Kingston-on-Thames.*

J. F. C.

[IN THE COURT OF APPEAL.]

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RISDALE *v.* OWNERS OF S.S. KILMARNOCK.

Employer and Workman—Compensation—Accident arising out of Employment — Mines laid by Enemy — Enlargement of Scope of Employment—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

The fact that the skipper of a steam trawler on his way from port to the fishing grounds takes a wrong course and enters an area in which he has been warned that an enemy has laid mines does not alter or enlarge the scope of the employment so as to exonerate the owners of the trawler from liability to compensate her engineer if she is blown up by a mine.

APPEAL from an award of the judge of the Great Grimsby County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant, J. F. Risdale, was employed as chief engineer on board the steam trawler *Kilmarnock* at a weekly wage of 2*l.* 6*s.* a week and perquisites. On September 22, 1914, the

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Kilmarnock left the port of Grimsby for a fishing voyage to the North Sea. Since the declaration of war it had been necessary for the skipper of every steam trawler, before leaving port, to obtain from the mobilizing officer R. N., trawler section, a pass to enable him to leave the port. The skipper of the *Kilmarnock* before he sailed obtained a pass and a chart from the mobilizing officer, who pointed out the marked areas in which mines had been laid by the Germans and warned him not to go into those areas. The skipper ignored these instructions and took his ship into a mine area. There he saw two mines and put a buoy down to mark the place. At that time a torpedo boat destroyer and some steam trawlers employed as mine sweepers were seen about thirteen miles away. The skipper thereupon altered the course of the *Kilmarnock* and took her across the mine area towards these ships with the intention of warning them of what he had seen. Whilst steaming in this direction the *Kilmarnock* struck a mine, was blown up, and sank. Only two of the crew were saved, including the applicant, who was seriously injured, his leg being damaged and the shock causing acute synovitis. It appeared that he had just come off duty and was on deck when the explosion took place, and was thrown into the sea. He applied for an arbitration to settle the amount of compensation due to him by his employers, the owners of the *Kilmarnock*.

The judge dismissed the application on the ground that an accident or injury caused by an alien enemy was not an accident within the intent of the Workmen's Compensation Act, 1906.

The applicant appealed.

Hollis Walker, K.C., and *C. M. Knowles*, for the appellant. The point that this was not an accident within the Act is not now raised by the respondents, so it is clear that this appeal should succeed. The applicant was doing his duty in his employment and had no power to raise objections to the course steered by the master.

[They were stopped by the Court.]

Leslie Scott, K.C., and *Adshead Elliott*, for the respondents. The respondents do not contend that the learned judge was right in holding that an injury caused by an alien enemy was not an

accident within the Act, but they maintain that the accident did not arise out of or in the course of the employment; it was altogether outside the employment. To make the owners liable it must be shown that the scope of the employment had been enlarged. The crew were engaged for a fishing voyage. The skipper was warned against the mines and was told the way to go, and in order to get to the fishing ground it was not necessary to go near the mine fields. The scope of the employment must be defined by the contract of employment of the crew. The skipper had no authority to take the ship near the mines. It is not suggested that the original scope of employment had been enlarged by the owners. The knowledge of the parties is immaterial, the question depends on the facts; if the accident occurs whilst the workman is doing something outside his employment it does not arise out of or in the course of his employment. As against the employer a superior servant cannot without special authority enlarge the scope of an inferior servant's employment. No doubt if the servant thinks he is within his employment and it turns out that he is not, it is hard on him; but the employer must also be protected. His responsibility cannot be increased by his servant's exceeding his authority. The owner would not be responsible if the skipper turned pirate. The test is what is the scope of the employment. It is immaterial whether the workman knows that what he is told to do is outside the employment, or that it will invalidate an insurance policy. Here the scope was not enlarged, for the skipper had no power to enlarge it: *Geary* v. *F. Ginzler & Co.* (1) If the appellant had known the facts he might have refused to proceed: *Palace Shipping Co.* v. *Caine* (2); but the contract of employment is to be found in the articles and cannot be enlarged in this way: *Plumb* v. *Cobden Flour Mills Co.* (3)

LORD COZENS-HARDY M.R. This is an appeal from a decision of his Honour Judge Sherston Baker; it raises a point no doubt of interest, but not of any serious difficulty. The applicant, Risdale, was an engineer. We have not the actual articles before

(1) (1913) 6 B. W. C. C. 72. (2) [1907] A. C. 386.
(3) [1914] A. C. 62.

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us under which he signed on, but it was stated by Mr. Leslie Scott, and assented to by Mr. Hollis Walker, that it was an engagement for six months, and not merely for this particular voyage. It was an engagement on a fishing smack, and it must be assumed that there was nothing special in the articles, but that they were articles of such a nature as by common knowledge are usual in employment of this kind.

Now, this fishing smack started from Grimsby on a fishing voyage, beyond all doubt, and nobody suggests for a moment that it was anything but a fishing voyage. There was alarm by reason of the fact that mines had been laid by the Germans between the east coast of England and the North Sea fishing ground, and a representative of the Admiralty at Grimsby told the captain of the danger. He said in his evidence "I gave a pass to trawlers, and about this time gave them a chart also. I gave a chart similar to this (produced) and pointed out his safe course. I warned him not to go into mine area. Ten to twelve miles was safe." Then he was cross-examined. "I gave orders only to masters of trawlers." So that in fact the master was warned that there was a certain zone of danger which it was prudent to keep out of—that in fact it would be safer if he went practically due south or a little south-east until he got nearly to the Wash and then went, roughly, north-east from that point. Instead of that the skipper steered his vessel nearly east-south-east. At a certain point when he was within the danger zone he saw two or three mines, he ordered his vessel to be stopped, and he buoyed those mines, so that it might be known by any of the men-of-war in the neighbourhood who were searching for mines that they would find them there. He saw at that time some war vessels nearly to the south, he altered his course to tell them where these buoyed mines were, and on his way he unfortunately fell foul of another mine which exploded and destroyed the vessel, and led to the death of all but two men, namely, the plaintiff and the mate. In those circumstances the plaintiff, who was picked up and saved but was seriously injured, took proceedings under the Workmen's Compensation Act, and the learned county court judge decided against him and dismissed the application with costs, on the ground that an accident or injury caused by an

alien enemy is not an accident within the intent of the Workmen's Compensation Act. I was curious to hear what arguments would be adduced in support of that proposition by the very learned and experienced counsel who represent the respondents, but they declined to argue such a point. It has been strongly argued that upon the facts which are proved there is sufficient to justify the decision of the learned county court judge. The view presented to us is that, although an accident caused by an alien enemy may be an accident within the Workmen's Compensation Act, yet it certainly is not on the facts of this case an accident arising "out of" the employment—possibly not "in the course of," but certainly not "out of," the employment. That, I think, is not an unfair mode of stating tersely the argument which has been presented to us. In my opinion there is no foundation for that argument. It is not suggested that the plaintiff, the chief engineer, was informed of any warning which was given by the Admiralty officer; it is not suggested that the *Kilmarnock* was engaged in anything else but a fishing voyage; it is not suggested that there was any such total breach of the contract of employment between the shipowner and the master as might have involved consequences which would justify the owner in saying "This is altogether outside of anything that I have agreed to."

Now, let us look at the matter from the common-sense point of view. What is the duty of an engineer in a fishing smack like this? He has nothing to do with the sailing directions; his duty is primarily to obey the lawful orders and directions of the master or the mate, or whoever may be the representative of the master, and if he is told down in the engine room "Stop," "Full steam ahead," or what not, he must obey those orders, and there is, if not an express, certainly a plainly implied term of the engagement of the engineer that he must obey the orders of the captain and not attempt to inquire what instructions the owners of the *Kilmarnock* have given to the captain. What happened here was that the *Kilmarnock*, which was on its way to the fishing ground, did not take the safest way of getting there, but went into the zone of danger, and when she arrived nearly at the end of the belt these mines were

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seen and they were buoyed. Was not that a proper act for the captain to do? It seems to me that plainly it was. When that had been done and men-of-war were seen in the distance was it not a proper act on the part of the captain and consistent with his duty and his obligations to go and warn the men-of-war that in certain buoyed places there were mines which might endanger the lives of the men on board those ships? In my opinion it is altogether a fallacy to say that anything happened in the interval between leaving Grimsby and the blowing up of the *Kilmarnock* by a mine to change the character of the applicant's employment or to make it cease to be his duty to obey the orders of the captain. It would be dangerous in the extreme to allow it to get abroad that an employee is not at liberty to take, nay, is not bound to take, orders from his superior when, as far as he knows, there have been no directions given by the employer to qualify the authority of the superior. The discipline of a ship, the discipline of a factory, the discipline of almost any institution of that kind, could not be carried on except on the footing that if a person is put over a subordinate employee that employee is not at liberty in matters within the scope of his employment to disobey orders given to him by the superior, and we cannot encourage any argument that if in those circumstances an accident arises the employer is not liable. In my opinion the order appealed from cannot be justified either on the ground stated by the learned county court judge or on the ground so ingeniously argued before us to-day. The appeal must be allowed with costs here and below, and the award will be for the agreed figures.

KENNEDY L.J. I am of the same opinion, and I am only going to say a few words on the point that this was not at the time that the man met with his injury an accident arising out of, or in the course of, his employment. I confess that it seems to me unarguable, when you once appreciate the position of an engineer in a ship, or, as in the present case, the particular kind of ship called a trawler. He is the engineer to drive the engines and to do all the work connected with the engines, and it clearly is part of his employment that he should obey in the engine room all

the reasonable and lawful orders given to him by the captain. He met with this accident when he was driving the engines, and driving them under the orders of the captain, those orders being, I suppose, simply orders to go ahead or go astern, or slow or stop. Whatever the various speeds ordered were, they were the reasonable and lawful orders of the captain.

Now it is said that the appellant cannot recover because at the time of meeting with the accident the captain was in fact, as he had been for some time, taking the trawler on a fishing expedition, but over a tract of sea as to which he had been told more or less peremptorily, and of course quite rightly, by the local officer of the Admiralty, that it was a region which he ought not to go to. I will assume that in going there his owner, if he was covered by insurance, risked whatever that may be which is granted by the Government. I will assume all that, but it seems to me impossible to say that this man in driving the engines at that moment was not acting in the employment, and that the accident did not arise out of the employment of driving the engines of the trawler. There are some things which one can test in a very brief form. I wonder what the owner himself would have said, leaving alone the skipper, if he had been told, if this vessel had come back, that when they were crossing this mine field the engineer had stopped the vessel and gone on deck and said "Do not you think, Sir, that you are steering a course far too much to the east of the course that you ought to pursue?" I think that the language of the skipper would probably have been strong, and that the sensations of the owner who was employing an engineer prepared to go upon deck and cross-examine the captain as to the course that he was steering would be such that the engineer would certainly lose any further chance of employment. Still further, it is said and urged that they were not fishing. Supposing that the engineer had gone on deck or had shouted up the tube to the skipper "Do you not think, captain, it is time to begin fishing?" I think that he would have a very difficult time with his employer when he came home, when the captain reported that he had had such an inquiry. To bring it to a more serious topic, suppose that he had stopped his engines and had communicated with the captain in some way—"Captain, do you

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not think that you have gone far enough now on the danger zone? It is time to turn back, otherwise you must get somebody else to work the engines." The position seems to me quite impossible and almost, one is tempted to say, absurd. No doubt it was a fishing voyage, but you do not fish all the way. The intention here was to fish, and it was intended, no doubt, to reach the fishing ground. I will assume that the captain (poor fellow, he too lost his life) was quite wrong in directing the course of the vessel over that route, but how can that affect the engineer who had no duty with regard to the matter except to obey the orders and who, so far as the captain was concerned, might well imagine that the captain had either not received the warning or, if he had received it, had received information later on that he might go by that route? He had neither the place nor the duty, nor, in my view, the right, to interrogate the captain, it not being obviously unlawful in any sense of the word, and I cannot see myself how it can be said that the accident did not arise out of and in the course of his employment.

SWINFEN EADY L.J. I am of the same opinion. The ground upon which the learned county court judge decided was that an accident or injury caused by an alien enemy is not an accident within the intent of the Workmen's Compensation Act. That ground has not been attempted to be supported here, and I can pass it by. The point that has been argued is that the accident in the present case did not arise out of, and in the course of, his employment. Now here the applicant was engineer on a trawler. The trawler was going out to the fishing ground, and what is said is that the trawler under the command of the skipper going out to the fishing ground did not take the proper course, that he had been warned by an official of the Admiralty, a petty officer, that after leaving the river he ought to have gone on a southerly course until he arrived at the southern end of the mine field, and ought at that point to have gone north-easterly to the fishing ground. It is said that instead of that the captain steered east-south-east at once, and in that way passed on to the mine field. That brought the boat to a point at which those on board saw three or four mines floating, which they buoyed. Thereupon

the skipper, seeing a destroyer and some mine sweepers twelve or fourteen miles to the south, thought it his duty to give such information as he then possessed to the officers on board the warships, and he altered the course of his vessel from east to south so that he might approach them; and it was when he was on that southerly course that the vessel struck another mine and unfortunately sank in consequence. The mate and the plaintiff, the chief engineer, were saved. The mate speaks to the course of the vessel being altered, and he says that when it was altered he thought that the vessel was going back to port. It was on this altered course that the accident happened. In my opinion the engineer was doing his duty and acting in and in the course of his employment. The navigation of the ship, or the course which the ship was to steer, was not in any way under his control. In all probability he did not know what the right or proper course to steer was. It is not suggested that anybody had given him information with regard to the existence of the mine field. His duty, as engineer on board that ship, was to comply with the instructions he received from bridge or deck, whether they were from skipper or mate or whoever was in charge of the ship at the time. In my opinion when this unfortunate accident happened the engineer was clearly acting in and in the course of his employment, and the accident arose out of and in the course of that employment. On these grounds I am of opinion that he is entitled to recover.

Appeal allowed.

Solicitors: *Page & Scorer, for H. K. Bloomer, Grimsby; Rutland & Crawford, for John Tonge, Grimsby.*

H. C. R.

1914
Oct. 26.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* INGLESON.

Criminal Law—Practice—Indictment for Larceny—Plea of "Guilty"—Misapprehension by Prisoner as to Meaning of Plea—Absence of Felonious Intent—Plea of "Guilty" wrongly entered at Trial—Order by Court of Criminal Appeal that Plea of "Not guilty" be entered and Case tried.

A prisoner pleaded guilty to an indictment charging him in the first count with stealing horses and in the second count with receiving the horses knowing them to have been stolen. On being asked whether he had anything to say why sentence should not be passed upon him he stated that he was guilty of taking the horses not knowing that they were stolen. He was then sentenced:—

Held, that the plea of "guilty" was wrongly entered and all proceedings at the trial consequent on that plea were bad; that a plea of "not guilty" must be entered, and the case must go back for trial.

APPEAL by the prisoner against his conviction and sentence.

On October 2, 1914, the prisoner pleaded guilty at the city of Bradford Quarter Sessions to an indictment which charged him with stealing horses and receiving them knowing them to have been stolen. When asked whether he had anything to say why the Court should not pass sentence upon him he replied "No, Sir," but handed to the recorder a written statement which, so far as material, was "I am guilty of taking the horses not knowing them to be stolen." He subsequently said to the recorder "This is my first offence."

The recorder: "I know, but you have pleaded guilty to stealing these horses."

The prisoner: "I pleaded guilty to taking the horses out of the field, not knowing they were stolen."

The recorder: "You have pleaded guilty to stealing them, plainly enough."

He was then sentenced by the recorder to four months' imprisonment with hard labour.

The prisoner appealed.

The Appellant in person.

F. Wood, for the prosecution. There is no precedent for quashing the conviction in the circumstances of this case. The

statement made by the prisoner shows that he thought that if he helped to dispose of the stolen property he was guilty although he did not know the property was stolen. He seems to have thought he ought to plead guilty and then ask the Court to give him a lighter sentence upon the ground that he did not know the property was stolen.

[ROWLATT J. It is clear that the plea of guilty has been wrongly entered.]

If the prisoner's plea of guilty ought not to have been accepted he must be sent back to be tried: *Rex* v. *Baker*. (1)

The judgment of the COURT (Lord Coleridge, Rowlatt, and Shearman JJ.) was delivered by

LORD COLERIDGE J. In this case there has been a mistake. The prisoner was charged with stealing and receiving horses; he pleaded guilty and handed up a statement to the recorder which, if believed, was a complete exculpation and which concluded with the words "I am guilty of taking the horses not knowing them to be stolen." If the recorder had read that it would be his duty to explain to the prisoner that his proper course was to plead not guilty and to have that plea entered. We presume that the recorder did not read to the end of the statement. It is most important that a prisoner should not be misled by the plea of guilty. He clearly thought he was guilty without having any felonious intent to steal. The absence of felonious intent is inconsistent with a plea of guilty either to the stealing or receiving. In those circumstances it is quite clear that the plea of guilty was wrongly entered and all the proceedings consequent on that plea are bad. A plea of not guilty must be entered and the case must go back for rehearing, and as the assizes precede the next sessions, the prisoner must go for trial to the assizes.

Appeal allowed.

Solicitor for prosecution: *Director of Public Prosecutions.*

(1) (1912) 7 Cr. App. Rep. 217.

J. E. A.

1914
Dec. 8, 9.

MATHERS *v.* PENFOLD.

Criminal Law—Person wandering Abroad in Public Highway to beg or gather Alms—Idle and Disorderly Persons—Builders on Strike—Vagrancy Act, 1824 (5 *Geo.* 4, *c.* 83), *s.* 3.

By s. 3 of the Vagrancy Act, 1824, "Every person wandering abroad, or placing himself or herself in any public place, street, highway, court or passage, to beg or gather alms . . . . shall be deemed an idle and disorderly person . . . . " and shall be liable to imprisonment with hard labour for one calendar month.

The respondent went up to several persons in succession in St. James's Square, Westminster, and the immediate neighbourhood, and asked them to buy some tickets which he then had in his possession, at the same time asking them to assist him as he was out of work through the strike hereinafter mentioned. In no case did any of the persons solicited buy any of the tickets or give the respondent any money. There was a dispute in the building trade in consequence of which the respondent, who was a member of the Shamrock branch of the United Order of General Labourers, an affiliated union under the Federation of Building Trade Unions, was out of work.

The Shamrock branch had organized a collection of funds to relieve their members who were out of work and their families, and in order to check the collectors the system of tickets was instituted. The respondent had possession of the tickets in pursuance of this scheme and was fully authorized by the branch to collect subscriptions.

The money so collected was divided equally amongst certain members of the Shamrock branch who were out of work, including the respondent, quite irrespective of the fact that some collected and some did not:—

Held, that the respondent was not begging within the meaning of the section, inasmuch as a person who is found in the street making or assisting to make a bona fide collection for a charitable object is not within either the mischief or the language of the statute.

In order to establish that a person has committed an offence within the section it is not necessary to prove that he has before the particular occasion been in the habit of begging, nor that he intends in the future to follow the habit of begging. He may adopt the calling for one day only and may by his conduct on the particular occasion complained of so behave himself as to afford evidence—either by the nature of his request, the persistence or importunity of his manner, the whining tone adopted, or the deceptive devices employed—upon which a magistrate may be satisfied that the act is not merely an isolated act, but is such an act of begging, within the meaning of the statute,

as to prove that he placed himself in a public place, &c., to beg or gather alms.

Judgment of Cave J. in *Pointon* v. *Hill* (1884) 12 Q. B. D. 306 commented upon.

CASE stated by a metropolitan magistrate.

On May 9, 1914, the respondent Penfold was brought by the appellant before the magistrate at the Marlborough Street Police Court and charged for that he on May 8, 1914, at St. James's Square, in the city of Westminster, did unlawfully wander abroad in a public place there to beg.

At 11.25 P.M. on May 8, 1914, in St. James's Square, Westminster, and the immediate neighbourhood, the respondent went to two gentlemen and asked them to buy some tickets which he then had in his possession and produced them to the gentlemen, who refused to purchase them. He then went to another gentleman and offered the same tickets for sale, at the same time asking the gentleman to assist him as he was out of work through the strike hereinafter referred to. The respondent in the same way solicited a lady and a gentleman who were together, and subsequently a gentleman who was walking alone. In no case did any of the persons solicited buy any of the tickets or give the respondent any money.

The appellant, who was on duty as a constable of the Metropolitan Police Force, apprehended the respondent under the power conferred by s. 6 of the Vagrancy Act, 1824, and made the charge hereinbefore mentioned before the magistrate.

When apprehended the respondent had in his possession one book of tickets containing twenty-four tickets and another complete book containing sixty tickets.

At the time of the alleged offence there was a dispute in the building trade in consequence of which the respondent was out of work.

The respondent was at the time of the alleged offence a member of the Shamrock branch of the United Order of General Labourers, this being an affiliated union under the Federation of Building Trade Unions. The Shamrock branch had organized a collection of funds to relieve their members who were out of work and their families. In order to have a check upon the collectors this

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system of tickets was instituted, the expectation being that when a donation was received the donor would accept a ticket or tickets corresponding in value to the amount given. The respondent had possession of the tickets in pursuance of this scheme and was fully authorized by the branch to collect subscriptions. The members so sent out to collect had to return to the committee at the time of accounting money or tickets corresponding to the total original face value of the tickets with which they had originally been entrusted. The Shamrock branch had at the time of the alleged offence 517 members, of whom 140 were then out of work in consequence of the dispute.

The money collected under the above system was divided equally amongst these 140 men, including as it did the respondent, quite irrespective of the fact that some collected and some did not. The amount which each man had received during the week next preceding that in which the alleged offence was committed was 7*s*.

Sect. 3 of the Vagrancy Act, 1824, so far as it relates to the offence charged is to the effect following:—"Every person wandering abroad, or placing himself or herself in any public place, street, highway, court or passage, to beg or gather alms . . . . shall be deemed an idle and disorderly person within the true intent and meaning of this Act" and shall be liable to imprisonment for any time not exceeding one calendar month.

The magistrate held that, whatever his opinion might have been had the matter been res integra, the facts of this case fell within the principle of the decision in *Pointon* v. *Hill*. (1) He therefore discharged the respondent, but granted the appellant's application for a case in order that it might be considered whether *Pointon* v. *Hill* (1) should not be reviewed.

Travers Humphreys, for the appellant. It must be admitted that the present case is not distinguishable in principle from *Pointon* v. *Hill* (1) upon the reasons given for that decision, though the facts are different. The real question, therefore, is whether that case was correctly decided and ought now to be followed. Both cases come precisely within the words of s. 3

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of the Vagrancy Act, 1824, and there is nothing in the wording of the section to indicate that it applies only to persons whose habit or mode of life is to beg. The difficulty with regard to street collections in London for charitable purposes, pointed out by Cave J. in *Pointon* v. *Hill* (1), has now been removed by regulations made under the Metropolitan Streets Act, 1903 (3 Edw. 7, c. 17). The words in that statute giving power to make regulations with respect to collecting money in the street for charitable "or other purposes" mean for other purposes of a charitable nature, not for any other purposes.

Langdon, K.C., and *H. Slesser*, for the respondent. The present case is within the principle of the decision in *Pointon* v. *Hill* (1), which was rightly decided. The meaning of the word "beg" as construed in *Pointon* v. *Hill* (1) is the natural one. In order to commit an offence under s. 3 of the Vagrancy Act, 1824, the person charged must be one of the class who lives by getting alms and not by doing honest work. The method employed by the respondent did not differ from that by which collections have been obtained for charitable objects for many years past, and the fact that the respondent himself was one of the beneficiaries makes no difference. If he did not intend it to be his habit of life he was not begging within the meaning of the section. The Vagrancy Act, 1824, must be read in the light of the earlier statutes which were clearly intended to deal with vagrancy and vagabondage, e.g., 22 Hen. 8, c. 12, and 14 Eliz. c. 5, repealed by 39 Eliz. c. 4. The language of the earlier statutes is brought down to modern times by the 10 Geo. 2, c. 28, 3 Geo. 4, c. 40, and the Vagrancy Act, 1824. None of those statutes have anything to do with an act of the character of that in which the respondent was engaged, namely, collecting contributions for a charitable and widely beneficial object. The only difference between the facts in the present case and those in *Pointon* v. *Hill* (1) is that in the present case the person asked to subscribe was an ordinary wayfarer and not, as in *Pointon* v. *Hill* (1), a person who happened to be in a shop or house. Even if it is doubtful whether *Pointon* v. *Hill* (1) was rightly decided, it ought not now to be overruled after having been considered

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to rightly declare the law for thirty years and followed by strikers for that period without police interference. *Pointon* v. *Hill* (1) has been impliedly recognized by the Legislature in the Metropolitan Streets Act, 1903, which gives power to make regulations with respect to the places where and the conditions under which persons may collect money in any street for charitable or other purposes. [*Logsdon* v. *Booth* (2) was also referred to.]

Travers Humphreys in reply. The test as to whether the person has committed an offence against s. 3 of the Vagrancy Act, 1824, is whether he has brought himself within the actual words of the section by "placing himself . . . . in any public place . . . . to beg or gather alms." If so he is prima facie guilty of an offence within the meaning of the Act. Within the metropolis he might be able to show that he had a defence to a charge of begging by proving that he was making a collection for a charitable purpose in accordance with the regulations made under the Metropolitan Streets Act, 1903. It would be a defence if he could prove that he was, within the meaning of that Act, making a collection for a charitable purpose. But in the present case there is no charitable purpose. The persons for whom the collection was made merely happened to be poor. The test is not whether the person charged with begging is in fact idle and disorderly, but whether he has done certain acts which cause him to be deemed to be idle and disorderly. If a person stands in a street and asks for alms, he commits an offence within the meaning of the Act of 1824. Although a person who merely asked one passer-by for alms would not bring himself within the statute, if he placed himself in the street for the purpose of begging even for one day he would be committing an offence. The test suggested by Cave J. in *Pointon* v. *Hill* (1) that it must be his habit and mode of life would make it extremely difficult to secure a conviction. The Metropolitan Streets Act, 1903, has only emphasized the law that merely collecting money for a charitable purpose is not begging.

DARLING J. In this case the respondent, who belonged to an association of persons some of whom were out of work, solicited

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alms in the street, and was charged under s. 3 of the Vagrancy Act, 1824, with unlawfully wandering abroad in a public place there to beg, which under the terms of the section involves a charge of being an idle and disorderly person. The magistrate declined to convict. The question which we have to decide turns upon the language of s. 3 of the Act of 1824, because the charge against him is that he is an idle and disorderly person within the meaning of that section, which enacts that "every person wandering abroad, or placing himself or herself in any public place, street, highway, court or passage, to beg or gather alms . . . . shall be deemed an idle and disorderly person within the true intent and meaning of this Act."

Now the respondent did undoubtedly place himself in a street, and he solicited contributions to a fund for the relief of persons who were out of work and were members of the society to which he himself belonged. He would or might benefit to some extent by any contributions that might be received. In my judgment the magistrate was right in refusing to convict him. I think that the Vagrancy Act, 1824, which enacts that a person infringing its provisions is to be deemed to be an idle and disorderly person, is aimed not at persons collecting for an object of a charitable nature in which possibly they themselves have an interest, but that it is directed at persons of a different type. It is not a statute which stands by itself. It is the result of a number of statutes dealing with persons who were a danger to society, persons wandering about the country without work. I am not in the least saying that when they were first passed the persons at whom those statutes were aimed were without work by their own fault, but they were without work, and being without work and without means, no doubt they were dangerous people, and it was necessary to deal with them. How they came to be in such a state is a matter of history, and one need not go into it, but there they were; and there having been these masses of persons about the country for many years, the Vagrancy Act, 1824, was passed to deal with them, as other statutes had been. I think that the preamble to the Act is important. It says: "Whereas . . . . it is expedient to make further provision for the suppression of vagrancy, and for the

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punishment of idle and disorderly persons, rogues and vagabonds, and incorrigible rogues in England . . . . " Sect. 3 commences by enacting that "every person being able wholly or in part to maintain himself or herself, or his or her family, by work or other means, and wilfully refusing or neglecting so to do, by which refusal or neglect he or she, or any of his or her family whom he or she may be legally bound to maintain, shall have become chargeable to any parish, township or place . . . ." That shows the kind of person, amongst others, who is aimed at. The section then uses the words which I read at the commencement of my judgment.

In my opinion what the respondent was doing was not begging in the sense in which the statute uses the word "beg." The word is one which may be used in many senses, e.g., you may say "I beg your pardon." The word used in that sense has very little similarity to the kind of begging which is done by a person whom the statutes designate a sturdy beggar and vagrant. This last kind of begging would be thought by most people to be rather a humiliating thing to do. It is done by persons—sturdy and troublesome beggars—of quite a distinct turn of mind. Following the word "beg" the section uses the expression "or gather alms." I think the respondent can hardly say he was not gathering alms. I think he was gathering alms, but it is to be noticed that he did not do it for the same kind of purpose as those persons did who were denominated by the statute idle and disorderly persons. He somewhat resembled in his attitude the monk who waited on Mr. Sterne in "The Sentimental Journey." In my opinion, it would be a misuse of language to say that the respondent, simply because he stood in the street and asked for contributions to a fund from which he and others were to profit, they being temporarily out of work, had become an idle and disorderly person. The words of the statute are obviously aimed at persons in a different category altogether, namely, persons who are wandering abroad, who are placing themselves at the corners of streets and begging or soliciting alms, such persons as are described in the judgment of Cave J. in *Pointon* v. *Hill* (1), which was concurred in by A. L.

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Smith J., as having given up work and adopted begging as a habit or mode of life. Those persons are clearly, I think, within the statute. I do not differ from the judgment of Cave J. in *Pointon* v. *Hill* (1), but I do not think that his definition in that case is exhaustive, inasmuch as it places a magistrate in the difficulty of having to ascertain whether a person has begged as a habit or mode of life, and magistrates have felt a difficulty if they find a person begging for the first time in holding that he is a beggar by habit or by mode of life. I do not agree that the right test is whether it is the first time a person has begged. I think that it is possible to say whether or not it is a person's habit or mode of life even though he has only just adopted it. If it were proved that a person, although having been in work, had definitely come to the conclusion, for reasons satisfactory to himself, that he did not wish to work and that he meant to lead the life of a gipsy—to live on alms which he might gather—I should say that a magistrate, being convinced by the evidence that this was so, might convict him under the statute and hold that the fact that he was demanding alms made him an idle and disorderly person within the statute, although there was no proof that he had ever done it before; because the proof that he had done it before would be only one way of proving what was his habit and mode of life, as Cave J. expresses it. You might prove by evidence, although it did not show that he had done it before, that such was his habit and mode of life; because a man may have a habit or mode of life although he has only just taken to it. For example, a barrister who has been called to the Bar, and has not yet had a brief, could on the first day that he is called say that he has adopted the habit or mode of life of a barrister, that he intends to get his living in that way although nobody has ever yet given him a brief. I should say of a beggar that it might perfectly well be proved, if the evidence was satisfactory to the magistrate, that he was a beggar by mode of life although he had not yet received a contribution, and although it was the first time he asked for one, and on that occasion in fact he did not obtain it. It might be difficult to prove, but the view I have expressed gets rid of the kind of notion that a

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beggar is like a vicious dog which cannot be proved to be vicious till it has bitten somebody. That is commonly taken to be so, although I should myself hardly say an actual bite is necessary if it had tried to bite some one. But it is not necessary to go as far as that with a beggar. If the magistrate is satisfied that the person charged with begging has taken to this mode of collecting alms, as a habit and mode of life, for his own benefit, he could be convicted although it was the first occasion that he had done it. I think that all that kind of evidence is rebutted when you come to the proof that although he may have solicited alms a hundred times he was soliciting them for a charitable purpose—for the sake of those who, like himself, were in misfortune—and that there was nothing disorderly in his conduct, that it was a well-arranged charitable collection, just as much as are the collections for many recognized charities. In that case, I think it would be an absolute misuse of language to say that he must be deemed to be an idle and disorderly person when he is not idle, when he is not disorderly, but simply because he has done one of those things which other persons who really are idle and disorderly are in the habit of doing. On these grounds, and not entirely upon the authority of the decision in *Pointon* v. *Hill* (1), I think the magistrate was right in dismissing this summons.

BANKES J. I agree. So far as the decision in this case is concerned, it is sufficient to say that, in my opinion, a person who is found in the street making or assisting to make a bona fide collection for some charitable object is not either within the mischief or the language of the statute. But we are told that the object of stating the case for the opinion of this Court is to obtain the view of the Court upon the decision of Cave J. in *Pointon* v. *Hill.* (1) I do not think that the decision itself is complained of, but what is said is that Cave J. applied a test which, if it be the correct test, renders it extremely difficult to enforce the statute.

The test that Cave J. laid down was that it was necessary to establish that the act complained of was part of the habit and mode of life of the person charged, and if he meant by that

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anything in the nature of a permanent habit or mode of life, or if he meant that it was necessary that evidence of a man's past life must be produced before his habit and mode of life can be ascertained, I should not agree with him; but I do not think that that is what he intended. At any rate, so far as I am concerned, I think that a person's past life may be a very good test of his present habit and mode of life, but it is certainly not the only test as to whether a person has on any particular occasion brought himself within the statute. A person, in my opinion, may by his conduct on the particular occasion complained of so behave himself as to afford evidence—either by the nature of his request, the persistence or importunity of his manner, the whining tone adopted, or the deceptive devices employed—upon which a magistrate may be satisfied that the act is not merely an isolated act, but is such an act of begging, within the meaning of the statute, that begging is the person's particular habit and mode of life at that time.

AVORY J. I am of the same opinion, and I only add anything to the judgments already delivered in order, if I may, to assist those who have to administer this Act of Parliament.

I quite appreciate the difficulty which the learned magistrate has felt in this case in consequence of the expressions which appear in the judgment in *Pointon* v. *Hill*. (1) So far as that decision is concerned, I think it was right, and I think it covers this particular case, and that the magistrate was right in dismissing the charge on the ground that the respondent was in fact collecting for a specific charitable purpose, and was not a person begging within the meaning of this statute. I agree also with what my brother Bankes has said, namely, that the expressions which are used by Cave J., if they are not calculated to mislead, are certainly calculated to create a great difficulty in the administration of the Act. I agree that it is not necessary to prove that a person has before the particular occasion been in the habit of begging, nor that he intends in the future to follow the habit of begging. I think that Mr. Travers Humphreys was right when he said that a person who places himself in the street

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to beg, that is to say to gather alms as a means of livelihood, is prima facie guilty of the offence under the statute, but the magistrate, when such a prima facie case is made, must be satisfied that the accused has in fact adopted the calling of a beggar. He may adopt that calling for one day only, and it is not necessary to prove that he has followed that calling previously or that he intends to follow it in the future.

LUSH J. It is, I think, impossible to read the preamble of this Act, or to observe the context in which this passage with regard to begging, which we have to consider, occurs, without seeing fairly clearly what the class of persons is against whom this legislation was directed. It seems to me to be clear that it was directed against that idle class of persons who, instead of endeavouring to earn their livelihood by work, prefer to loaf about or wander abroad, as the section says, or place themselves in a public street, and to beg or gather alms. That is the class of persons against whom this part of the section was directed, who are not improperly called "idle and disorderly persons."

It seems to me quite impossible to say that a person who, like the respondent, was engaged in collecting funds on behalf of the trade union to which he belonged is within the class of idle and disorderly persons against whom this part of the section is directed.

Now Mr. Travers Humphreys has criticized a test which Cave J. and A. L. Smith J. laid down in *Pointon* v. *Hill.* (1) Speaking for myself, it seems to me that that test was a perfectly accurate and proper one, if I may say so. Cave J. uses the language which has been criticized, speaking of begging "as a habit or mode of life," in order to distinguish that case from a mere isolated case of begging, and to distinguish it also from a case in which, although the person was no doubt gathering alms, he was doing so not because he either had in the past lived or was intending in the future to live an idle and disorderly life, making his livelihood by begging; it was to distinguish the systematic beggars from persons who not intending to live a life of that kind were merely begging on an isolated occasion

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or aiding in the collection of funds for a charitable or quasi-charitable purpose in which they were interested. It seems to me that that is all Cave J. meant. It may be a habit in the past, it may be an indication of a habit intended to be formed in the future, but Cave J. said that, unless it is one or the other of those habits (and I entirely agree with him), the case would not come within the Act. I agree, therefore, that the appeal ought to be dismissed.

ATKIN J. The offence created by s. 3 of the Vagrancy Act, 1824, applies to every person wandering abroad or placing himself or herself in any public place to beg or gather alms. In my judgment no offence is committed if in fact the person is collecting money bona fide for a specific charitable purpose. In that case he cannot be said to be begging or gathering alms within the meaning of the statute. The offence consists of wandering abroad or placing himself in a public place to beg, and I think that, inasmuch as that purpose has to be shown, the case of a person who is merely found casually begging would be excluded; the section excludes any casual or desultory act of begging. But if a person has in fact placed himself in a public street for the purpose of collecting alms in order to obtain wholly or in part his daily subsistence, I think that he has committed an offence within the meaning of the Act, and I see nothing in the Act which uses, or contains, or implies the words "mode or habit of life." In my view the offence is committed in the circumstances which I have stated. In this case it appears to me plain that the person who was charged was not in fact in any sense begging, and, therefore, that his acquittal was perfectly right.

Appeal dismissed.

Solicitors for appellant: *Wontner & Sons.*

Solicitors for respondent: *Kenneth Brown, Baker, Baker & Co.*

J. E. A.

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Nov. 26.

McNAIR, Appellant *v.* TERRONI, Respondent.

Adulteration—Food and Drugs—Milk—"Exposed to sale"—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 17.

By s. 17 of the Sale of Food and Drugs Act, 1875, if an inspector applies to purchase any article of food exposed to sale or on sale by retail in a shop, the article being required for the purpose of analysis, and the person exposing the article for sale refuses to sell it, such person shall be liable to a penalty.

The respondent carried on business as a confectioner and eating-house keeper. An inspector applied to the manager of the respondent's shop to purchase a glass of milk required by him for the purpose of analysis. There was at the time milk in a pan on the counter, but the respondent's manager had instructions from him not to sell milk alone, but only to add it to cups of tea or other liquids, and the milk in the pan on the counter was kept there to be sold in that manner only. The respondent's manager on this ground refused to sell to the inspector a glass of the milk:—

Held, that although the milk was only intended to be sold in the manner above mentioned it had nevertheless been exposed to sale and was on sale by retail within the meaning of s. 17, and that the respondent was therefore liable to a penalty in respect of the refusal to sell.

Case stated by a metropolitan magistrate.

1. On February 17, 1914, a summons was heard by the magistrate in which Alexander McNair (hereinafter called "the appellant") was the complainant against Peter Terroni (hereinafter called "the respondent") for that the respondent did on January 16, 1914, at No. 1, Catherine Street, Strand, in the city of Westminster, expose for sale by retail in a certain shop there situate a certain article of food, to wit, milk, and that the appellant, being an inspector appointed by the mayor, aldermen, and councillors of the city of Westminster under the Sale of Food and Drugs Acts, 1875 to 1899, applied to Giuseppe Croci, the representative of the respondent, to purchase from the respondent the said article of food, and tendered to the said representative the price of a certain quantity thereof, to wit, one glass, which the appellant required for the purposes of analysis, the said quantity not being more than was reasonably requisite,

and that the respondent's said representative unlawfully refused to sell the same to the appellant contrary to the provisions of s. 17 of the Sale of Food and Drugs Act, 1875. (1)

2. On the hearing of the summons the following facts were admitted or proved in evidence :—

3. The appellant was an inspector duly appointed by the mayor, aldermen, and councillors of the city of Westminster under the Sale of Food and Drugs Acts, 1875 to 1899.

4. The respondent carried on business at 1, Catherine Street, in the said city, as a confectioner and eating-house keeper.

5. The respondent had several like places of business in the city of Westminster and elsewhere, and Giuseppe Croci was the manager in charge of the shop at 1, Catherine Street.

6. On January 16, 1914, the appellant directed Albert West, his assistant, to go into the said shop of the respondent and to purchase articles of food, including milk, for the purpose of their being analysed under the provisions of the Sale of Food and Drugs Acts, 1875 to 1899.

7. In the shop on the counter was a pan labelled "pure milk." Milk was delivered daily at the shop by a dairyman in the morning, and sometimes some more in the afternoon. The milk when delivered was poured into and kept in the counter pan, which would hold about six or eight quarts.

8. West asked to be served with a glass of milk, but the man behind the counter refused to serve him.

9. The appellant on being informed of the refusal to sell the milk entered the shop and asked to be supplied from the counter pan with a glass of milk and tendered 2*d.*, the price thereof. The appellant at the time when he asked to be supplied with the milk stated that he was an inspector duly appointed under the

(1) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 17: "If any such officer, inspector, or constable, as above described, shall apply to purchase any article of food or any drug exposed to sale, or on sale by retail on any premises or in any shop or stores, and shall tender the price for the quantity which he shall require for the purpose of analysis, not being more than shall be reasonably requisite, and the person exposing the same for sale shall refuse to sell the same to such officer, inspector, or constable, such person shall be liable to a penalty not exceeding ten pounds."

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Sale of Food and Drugs Acts, 1875 to 1899, and that he required to be supplied with the milk for the purpose of analysis under the provisions of s. 17 of the Sale of Food and Drugs Act, 1875.

10. Croci, as the manager of the shop, refused to supply the appellant with any milk and said "I cannot serve you with milk, I do not sell milk."

11. The respondent had given directions to his servants not to sell milk alone, but only to add it to cups of tea or coffee or cocoa or glasses of soda water, and the milk in the counter pan was kept there to be sold in that manner only.

12. At the time of the refusal to supply the milk there was milk in the counter pan which was said to amount to two quarts.

13. On behalf of the respondent it was contended that the milk upon the premises was only for the purpose of adding to cups of tea or coffee or cocoa or glasses of soda water and was not sold separately, nor was any separate charge made for it, it being included in the price of the cup of tea, coffee, or cocoa or the glass of soda and milk, and that, therefore, the milk was not an article of food exposed for sale or on sale by retail on the said premises within the meaning of s. 17.

14. On the part of the appellant it was submitted that as the milk was in a pan on the counter labelled "pure milk" and was intended to be sold with tea or coffee or cocoa or mixed with soda water it was exposed for sale or on sale by retail within the meaning of s. 17.

15. The magistrate was of opinion that the milk in the pan was not intended to be sold alone, but only to be used in conjunction with tea, coffee, or cocoa or soda water, and that, therefore, it was not exposed for sale or to be sold by retail within the provisions of s. 17 of the Sale of Food and Drugs Act, 1875, and that it was an attempt on the part of the appellant to obtain milk for testing which was used in an eating-house for the purpose of being mixed with tea, coffee, cocoa, or soda water. The magistrate therefore dismissed the summons against the respondent.

16. The question of law for the decision of the Court was whether or not the magistrate was right in holding that on the above facts the milk was not exposed for sale within the meaning of s. 17.

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The magistrate added a postscriptum to the case in the following terms:—"I have signed the above case as agreed between the parties. I desire to make it plain that my finding of fact was and is that the article of food, to wit, milk, was not exposed to sale or on sale by retail as milk upon the said premises. I was further of opinion that the defendant was not liable to conviction under the section for refusing to sell to the inspector an article of food in which he did not deal.

"(Signed) A. Antwis Hopkins."

McCall, K.C., and *Morton Smith*, for the appellant. On the facts stated in the case the respondent should have been convicted of the offence under s. 17 of the Act. An article of food is not prevented from being "exposed to sale" or "on sale by retail" within the meaning of that section merely because it is not intended to be sold separately, but only when mixed with some other article. This milk was exposed to sale before it was mixed with tea, &c. If the decision of the magistrate is right the whole object of the section will be defeated, for, as Lord Coleridge C.J. said in *Dyke* v. *Gower* (1), the Act "was passed with the object, not of punishing the seller, but of protecting the buyer."

The respondent did not appear.

RIDLEY J. In this case the respondent was charged with an offence under s. 17 of the Sale of Food and Drugs Act, 1875, that is, with refusing to sell certain milk which was alleged to have been exposed to sale or on sale by retail on the respondent's premises, and which was required by an inspector for the purpose of analysis.

The facts as found by the magistrate are that the milk in question was in a pan on the counter of the respondent's shop; it was not intended to be sold alone, but only for the purpose of mixing it with cups of tea, &c. On these facts the magistrate held that the milk was not exposed to sale or on sale by retail. I do not agree with that view. In my opinion, although the milk was going to be mixed with something else it was none the less

(1) [1892] 1 Q. B. 220.

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exposed to sale and intended to be sold. The magistrate has added a postscriptum to the case in which he states that his finding of fact was that the milk was not exposed to sale or on sale by retail as milk. But that is a question of law to be determined on the facts found by the magistrate, and I have no doubt at all that the decision of the magistrate on the point of law was wrong. The case must, therefore, go back to the magistrate with a direction to him to convict the respondent.

AVORY J. I am of the same opinion. The magistrate appears by the postscriptum to turn into a question of fact the question of law which he had already stated in the case. It clearly is a question of law whether milk which is only intended to be sold when mixed with something else is exposed to sale or is on sale by retail within the meaning of s. 17. On the facts stated in the case I am clearly of opinion that the milk was exposed to sale.

LUSH J. I agree. The point seems to me to be a very plain one.

Appeal allowed.

Solicitors for appellant: *Allen & Son.*

F. O. R.

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Adulteration—Sale to Prejudice of Purchaser—Coffee mixed with Chicory—Notice by Label—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict.* c. 63), *ss.* 6 *and* 8.

By s. 6 of the Sale of Food and Drugs Act, 1875, "No person shall sell to the prejudice of the purchaser any article of food . . . . which is not of the nature, substance, and quality of the article demanded by such purchaser," under a penalty.

Sect. 8: "Provided that no person shall be guilty of any such offence as aforesaid in respect of the sale of an article of food . . . . mixed with any matter or ingredient not injurious to health, and not intended fraudulently to increase its bulk, weight, or measure, or conceal its inferior quality, if at the time of delivering such article he shall supply to the person receiving the same a notice, by a label distinctly and legibly written or printed on or with the article . . . . to the effect that the same is mixed."

The appellant requested the respondent, a grocer, to sell to him a number of articles, including ½ lb. of coffee. The respondent sold to the appellant all those articles wrapped together in a piece of brown packing paper for the convenience of the appellant in taking them away and in accordance with what is a well-recognized and general custom of trade. There was no notice or statement upon the outer wrapper. No verbal statement was made to the purchaser at the time of the sale or delivery to him of the goods, both of which took place in the respondent's shop. Upon opening the parcel the purchaser saw that the ½ lb. of coffee was enclosed in a wrapper bearing the words "This is sold as a mixture of coffee and chicory." Those words were clearly and legibly printed, and no other words appeared upon the wrapper. The purchaser had no opportunity of seeing and did not in fact see the notice until he opened the brown paper parcel. The coffee contained 22 per cent. of chicory. The admixture of chicory was not excessive and was not intended fraudulently to increase the bulk, weight, or measure of the article sold, nor to conceal its inferior quality. It is a usual and well-known practice in the grocery trade to supply a mixture of coffee and chicory and to deliver the mixture in a wrapper bearing the words which were upon the wrapper used in the present case:—

Held, per Darling, Bankes, Lush, and Atkin JJ. (Avory J. dissenting), that the respondent was within the protection afforded by s. 8 and had therefore not committed an offence under s. 6. Sect. 8 does not say that the person delivering the article must "give notice," but that if he "shall supply . . . . a notice by a label" to the person receiving the article to the effect that the same is mixed he shall not be guilty of

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an offence under s. 6, and there is no obligation upon him to call the attention of the purchaser to the label.

Jones v. *Jones* (1894) 58 J. P. 653 approved of and followed.

Batchelour v. *Gee* [1914] 3 K. B. 242 and the dicta of Lord Alverstone C.J. in *Pearks, Gunston & Tee* v. *Houghton* [1902] 1 K. B. 889, upon which the decision in *Batchelour* v. *Gee* was based, disapproved of and not followed.

CASE stated by a metropolitan magistrate.

An information was preferred by the appellant, Alfred Clifford, under the Sale of Food and Drugs Acts, 1875 to 1907, against the respondent, Henry Battley, for that he on July 24, 1914, in the borough of Finsbury, did unlawfully sell to the prejudice of the purchaser Clifford a certain article of food, to wit, coffee which had been adulterated by the admixture of chicory to the extent of 22 per cent., so that the coffee was not of the nature, substance, and quality of the article demanded by the purchaser, contrary to the Sale of Food and Drugs Acts, 1875 to 1907.

Upon the hearing of the information the following facts were admitted or proved.

The respondent was a grocer carrying on business at 108, King's Cross Road, in the borough of Finsbury. On July 24, 1914, the appellant requested the respondent in his shop to sell and supply to him a number of articles, namely, ¼ lb. tea, 1 lb. lump sugar, ½ lb. rice, 2 oz. pepper, ½ lb. coffee, and 1 lb. moist sugar. The respondent sold and supplied to the appellant all the goods wrapped together in a piece of brown packing paper. There was no notice or statement upon the said outer wrapper. No verbal statement was made to the purchaser at the time of the sale or delivery of the goods. Upon opening the parcel the purchaser saw that the ½ lb. coffee was enclosed in a wrapper bearing the words "This is sold as a mixture of coffee and chicory." Those words were clearly and legibly printed, and no other words appeared upon the wrapper. The purchaser had no opportunity of seeing and did not in fact see the notice until he opened the brown paper parcel, but he saw it immediately on opening the parcel. The goods were enclosed in the brown paper outer wrapper for the convenience of the purchaser in taking them away from the shop and in accordance with what is a well-recognized and general custom of trade. After the purchase was

completed the appellant duly notified the respondent of his intention to have the coffee analysed by the public analyst and in the presence of the respondent divided the coffee into three parts which were then and there separated. Each part was marked and fastened up, and one part was then duly delivered to the respondent. The appellant on July 24, 1914, submitted another part to the public analyst and retained the third part in his own possession, the same being duly produced in Court before the magistrate. The part so submitted to the public analyst was duly analysed by him, and he gave a certificate wherein he specified that as a result of the analysis he found that it contained 22 per cent. of chicory. The admixture of chicory was not excessive and was not intended fraudulently to increase the bulk, weight, or measure of the article sold nor to conceal its inferior quality. It is a usual and well-known practice in the grocery trade to supply a mixture of coffee and chicory and to deliver the mixture in a wrapper bearing the words which were upon the wrapper used in the present case.

It was contended on the part of the appellant that the magistrate was bound by the decision in *Batchelour* v. *Gee* (1), and that as the attention of the purchaser was not specifically drawn to the notice on the wrapper, and as it was not brought to the mind of the purchaser by any other means at the time of the sale that there was a label on the article supplied, there was no notice to him within the meaning of s. 8 of the Sale of Food and Drugs Act, 1875. (2) It was contended by the respondent that *Jones* v.

(1) [1914] 3 K. B. 242.

(2) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6: "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds; provided that an offence shall not be deemed to be committed under this section in the following cases; that is to say,

(1.) where any matter or ingredient not injurious to health has been added to the food or drug because the same is required for the production or preparation thereof as an article of commerce, in a state fit for carriage or consumption, and not fraudulently to increase the bulk, weight, or measure of the food or drug, or conceal the inferior quality thereof: . . . ."

Sect 8: "Provided that no person shall be guilty of any such offence as aforesaid in respect of the sale of an article of food or a drug mixed

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Jones (1) and *Batchelour* v. *Gee* (2) were conflicting decisions of equal authority, that the statement of Lord Alverstone C.J. in *Pearks, Gunston & Tee* v. *Houghton* (3) that " the question of the sufficiency of the notice is one to be decided on the particular facts of each case " justified the magistrate in distinguishing the present case from *Batchelour* v. *Gee* (2), and that the facts of the present case were precisely the same as those in *Jones* v. *Jones* (1), which was therefore the decision which the magistrate ought to follow.

The magistrate considered that the present case came within the decision in *Jones* v. *Jones*. (1) There was no suggestion of fraud; the brown paper was used to pack the parcel, not to conceal the contents. He found that the notice given in the circumstances was a sufficient notice to the purchaser within the meaning of s. 8 of the Sale of Food and Drugs Act, 1875, and he therefore dismissed the summons.

The question for the opinion of the Court was whether the magistrate was right in law in dismissing the summons.

George Elliott, K.C., and *H. J. Rowlands*, for the appellant. The question is whether the fact that the packet of coffee contained in the brown paper parcel had a label upon it—although the label was obscured and could not be seen by the purchaser owing to the brown paper parcel in which it was contained—was a sufficient compliance with s. 8 of the Sale of Food and Drugs Act, 1875. The various packets were covered by the outer brown paper wrapper for the general convenience of the customer.

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with any matter or ingredient not injurious to health, and not intended fraudulently to increase its bulk, weight, or measure, or conceal its inferior quality, if at the time of delivering such article or drug he shall supply to the person receiving the same a notice, by a label distinctly and legibly written or printed on or with the article or drug, to the effect that the same is mixed."

Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 12: "The label referred to in section eight of the Sale of Food and Drugs Act, 1875, shall not be deemed to be distinctly and legibly written or printed within the meaning of that section unless it is so written or printed that the notice of mixture given by the label is not obscured by other matter on the label . . . ."

(1) 58 J. P. 653.

(2) [1914] 3 K. B. 242.

(3) [1902] 1 K. B. 889.

It is clear that under s. 6 of the Sale of Food and Drugs Act, 1875, if at the time of the purchase any statement is made, or notice of any kind is given from which it can be inferred that it is necessarily brought to the mind of the purchaser, that the goods sold are adulterated or mixed, the statement or notice absolutely relieves the vendor and protects him from any prosecution under that section.

Sect. 8 is the section upon which the question before the Court turns. The distinction between it and s. 6 is that, if there be any kind of notice given under s. 6, s. 8 does not come into operation because it is not necessary. Sect. 8, in case there is nothing said, and no notice given by the seller, gives him protection if there is upon or with the article sold a label in clear and legible writing or printing containing the statement that the article so sold contains an admixture or is in some form or other adulterated. The seller must supply a notice. If the label had been clearly shown to and must have been seen by the purchaser, it would have been sufficient notice. But although there was a label on the packet it was not a notice, because it was covered up with the outer brown paper. Unless in the circumstances of this case the purchaser was supplied with a notice an offence has been committed, and the mere fact that the packet of coffee did in fact have upon it a label, which if it had been shown to the purchaser at the time of the purchase would have sufficed and given the vendor protection under the Act, is not supplying a notice: *Batchelour* v. *Gee*. (1) The seller might have shown the packet of coffee to the purchaser before putting it into the general parcel. The question is whether this practice in the trade defeats the object of s. 8, which is to protect the vendor if he supplies the purchaser with notice. The question is not whether the seller supplies the purchaser with a label, but with a notice.

If the label is so concealed that it is not seen it cannot be a notice. So far as the mind of the purchaser was concerned it was precisely in the same condition (that is to say, it was obscured by the covering of the brown paper parcel) as if it had been placed inside the package which contained the coffee.

(1) [1914] 3 K. B. 242.

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It ought to be in such a position that it has brought to the mind of the purchaser at the time of the purchase that the article is mixed. The mere fact that the seller does something to oblige the customer does not relieve him of his obligation under the statute. [Sect. 9 of the Sale of Food and Drugs Act, 1875, s. 12 of the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), and s. 6 of the Margarine Act, 1887 (50 & 51 Vict. c. 29), were also referred to.]

Sir Robert Finlay, K.C., Macmorran, K.C., and *Grimwood Mears*, for the respondent. No offence is committed under s. 6 of the Sale of Food and Drugs Act, 1875, if at the time of the transaction the seller says to the purchaser in any way "This is a mixed article"; but in order to establish a defence in that way the seller has to enter into matters as to which there may be a conflict of testimony, and a tradesman might be placed in a very embarrassing position if he had in every case to establish as a matter of fact that that intimation had been given. Sect. 8 avoids any conflict of testimony by providing that a tradesman is protected if he supplies a notice by a label stating that the article sold is a mixture. That notice must be clearly and legibly written, and s. 12 of the Sale of Food and Drugs Act, 1899, provides that it must not be obscured by any additional matter. The argument for the appellant proceeds upon a misreading of s. 8 of the Act of 1875. That section does not provide that the purchaser shall have the label communicated to him. The tradesman is protected if he supplies the label clearly and legibly written. The expression "supply a notice" in s. 8 does not mean conveying the notice to the mind of the purchaser. It indicates that what has to be supplied is a document in the form of a label. There is a distinction between "give notice" and "give a notice" or "supply a notice." By the words "supply a notice" is meant supply a document, and the words "by a label" in s. 8 explain what the document is to be. It affords complete protection if the label is affixed to the article. If a seller deliberately covered the label up with paper he would not be supplying a label to the purchaser. *Sandys* v. *Small* (1) shows that the seller has absolute protection under s. 8 if he

(1) (1878) 3 Q. B. D. 449.

supplies a label, but he may defend himself under s. 6 by showing in any way that the purchaser had notice. *Jones* v. *Jones* (1) is directly in point, and the decision is right. The dicta of Lord Alverstone C.J. in *Pearks, Gunston & Tee* v. *Houghton* (2) to the effect that the label on the inner wrapper in which the butter was delivered was not a sufficient notice within s. 8 of the Act are merely obiter and ought not to be followed in preference to the decision in *Jones* v. *Jones*. (1) When as in the present case the packet has a label containing the most unequivocal terms upon it, and all that takes place is in the ordinary course of business and for the convenience of the purchaser in order that he may have several articles included in one parcel, the seller is completely protected, for s. 8 does not say that he is to give notice to the purchaser; it only says that he is to supply him with a notice by a label.

If the packet of coffee were given to the purchaser in such a way as to show that it was intended that the purchaser should not see the label, other considerations would arise. The packet must have upon it when supplied a perfectly legible label pasted on so that it can be read, and there must be no contrivance used to prevent the purchaser reading it. There are no words in s. 8 which can be construed as meaning that the seller has in any way to call the attention of the purchaser to the fact that there is a label. It is enough if he supplies an article with a label upon it without having recourse to any contrivance to conceal the existence of the label.

Sect. 12 of the Sale of Food and Drugs Act, 1899, shows that all that s. 8 of the Act of 1875 requires is a written or printed label, and it provides against the printing or reading being obscured by other matter. As long as there is a label supplied with the goods which contains a clear intimation of the mixture the Act of 1875 has been fully complied with, and s. 12 of the Act of 1899 brings that point into clearer relief. Sect. 8 of the Act of 1875 was intended to provide a complete protection for an honest tradesman.

The decision in *Batchelour* v. *Gee* (3) is inconsistent with

(1) 58 J. P. 653. (2) [1902] 1 K. B. 889.
(3) [1914] 3 K. B. 242.

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the true interpretation of the Act of 1875 and with earlier decisions, and the reasoning in the judgment of Rowlatt J. in *Batchelour* v. *Gee* (1) is in favour of the respondent.

The notice spoken of in the Act of 1875 is not a notice that there is a label; it is a notice that the article is mixed. Sect. 8 was intended to give further protection to the vendor than s. 6. It is not merely a reiteration of s. 6. Sect. 9 of the Act of 1875, which deals with abstracting any essential part of an article of food, requires any person who shall sell any article so altered to make disclosure of the alteration. That section requires disclosure of the alteration, whereas all that is required by s. 8 is that a notice in the form of a label should be supplied.

In *Jones* v. *Davies* (2) the attention of the purchaser was not called to any label. The present is an a priori case because the words of s. 9 of the Act of 1875 are "disclosure of the alteration," and it was held in effect in *Jones* v. *Davies* (2) that there was evidence from which the justices could find that there was disclosure. See also *Platt* v. *Tyler* and *Wright* v. *Tyler* (3) and *Spiers & Pond* v. *Bennett.* (4) In *Toler* v. *Bischop* (5), a decision upon s. 6 of the Margarine Act, 1887, the authority of *Jones* v. *Jones* (6) was recognized by Lord Russell of Killowen C.J. *Jones* v. *Jones* (6) only follows the sound principle laid down by Cockburn C.J. in *Sandys* v. *Small* (7) and is entirely consistent with the scheme of the Act of 1875. The true effect and whole object of s. 8 of the Act of 1875 would be frittered away if it were read in the sense that it is incumbent upon the tradesman to call the attention of the purchaser to the label. If a tradesman has supplied a label with or on an article, he has done everything that Cockburn C.J. in *Sandys* v. *Small* (7) said was necessary to entitle him to protection under the Act of 1875. [*World's Tea Co.* v. *Gardner* (8), *Star Tea Co.* v. *Neale* (9), and *Hayes* v. *Rule* (10) were also referred to.]

George Elliott, K.C., in reply. The cases cited on behalf of the

(1) [1914] 3 K. B. 242.
(2) (1893) 57 J. P. 808.
(3) (1894) 58 J. P. 71.
(4) [1896] 2 Q. B. 65.
(5) (1896) 60 J. P. 9.
(6) 58 J. P. 653.
(7) 3 Q. B. D. 449.
(8) (1895) 59 J. P. 358.
(9) (1909) 73 J. P. 511.
(10) (1902) 87 L. T. 133.

respondent fall into three clases: 1, where notice is posted up in the shop or put upon the counter, as in *Sandys* v. *Small* (1) and *Spiers & Pond* v. *Bennett* (2); 2, the margarine cases—and in every one of those there was ample disclosure of the fact that it was margarine; and 3, the class which is represented by *Jones* v. *Jones*. (3) The object of the Sale of Food and Drugs Acts, 1875 to 1899, is not the protection of the vendor, but that of the purchaser, and, although it may be true that ss. 8 and 9 of the Act of 1875 and s. 12 of the Act of 1899 were introduced to afford the vendor opportunities of protecting himself, he can only take advantage of those sections if he does so in such a way as not to amount to deception of the purchaser.

If the seller knew that the person who receives the article is in some inaccessible place, and would not have an opportunity of inspecting it before he received it, he ought to disclose the fact of any mixture to the purchaser. The label would afford no protection if he did not make disclosure, because it would be fraud on his part. If fraud be proved on the part of the seller the label would be of no effect. The decision in *Batchelour* v. *Gee* (4) ought to be upheld in preference to that in *Jones* v. *Jones*. (3)

DARLING J. The question in this case turns upon the true construction of s. 8 of the Sale of Food and Drugs Act, 1875, and upon that section ss. 6 and 9 of that Act as well as s. 12 of the Sale of Food and Drugs Act, 1899, have some bearing. The appellant requested the respondent, a grocer, to sell to him a number of articles, including ½ lb. of coffee. It is quite obvious that those articles would be very inconvenient to carry away if they were not made into one packet. The case stated by the magistrate disposes of any sort of suggestion or suspicion that what was done by the seller was done for the purpose of any concealment or fraud, and therefore it is not necessary to consider what would be the effect of fraud or concealment upon transactions which it might be contended were protected by s. 8 of the Act of 1875. As the authorities directly bearing upon the question before us are utterly

(1) 3 Q. B. D. 449.
(2) [1896] 2 Q. B. 65.
(3) 58 J. P. 653.
(4) [1914] 3 K. B. 242.

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irreconcilable, I think it is worth while to consider the early case of *Sandys* v. *Small*. (1) I quite agree with the view expressed by Cockburn C.J. and which appears at p. 452 of the report in the *Law Reports*. He said: "I should be very sorry to diminish the efficacy of a very useful Act, intended to protect the public from frauds committed by the sellers of the articles to which the Act relates, but we ought, if possible, to construe the words of the Act so as not to interfere with due freedom of dealing between the seller and the purchaser, and not unfairly to prejudice either party." I think it would unfairly prejudice the seller of this coffee if we were to hold that he did not comply with the requirements of s. 8 of the Act of 1875 because—although he placed a legible label on the inner wrapper stating that it contained a mixture of coffee and chicory—he, for the convenience of the customer, put that wrapper containing the coffee and chicory into a parcel with other articles, that is to say, placed a piece of brown paper around the wrapper which contained the mixture of coffee and chicory and around the several other articles. *Jones* v. *Jones* (2) is an authority for holding that in these circumstances no offence was committed by the respondent, while on the other hand it is quite clear that *Batchelour* v. *Gee* (3) is an authority in support of the view that an offence was committed by the respondent. I take the view which was shortly put by Mr. Macmorran, K.C., in his argument in *Batchelour* v. *Gee* (3) when he contended that s. 8 was intended to give additional protection to the vendor. Sect. 6 gives protection in certain cases. I think it is worth observing that what is said in s. 8 is that a person shall not commit "any such offence . . . . if . . . . he shall supply to the person receiving the same a notice." It does not say "shall give notice." If the words had been "shall give notice" I think there would have been a very strong argument in favour of coming to the same conclusion as that at which my brother Avory arrived in *Batchelour* v. *Gee* (3), where he says: "Those words import that there must be brought to the mind of the purchaser the fact that there is a label on the article." If those words imported that meaning they would also import that

(1) 3 Q. B. D. 449. (2) 58 J. P. 653.
(3) [1914] 3 K. B. 242.

the meaning of that which is printed on the label must be brought to the mind of the purchaser. But the statute does not say so. It does not say "shall give notice," it says "shall supply a notice." Suppose a grocer asked "How am I to supply a notice?" The statute tells him. It says "by a label distinctly and legibly written or printed on or with the article or drug to the effect that the same is mixed." I do not think the Legislature meant simply to treat the vendor in every case as though he were a fraudulent person and the purchaser as though he were an absolute innocent who does not know what he is about and must be told at every turn what is the exact nature of the article he is buying and warned that he had better see that he does not get anything else. I think the meaning of s. 8 is that an additional protection is to be given to the vendor. The only further observation I desire to make with regard to the judgment of my brother Avory in *Batchelour* v. *Gee* (1) is that he declined to follow *Jones* v. *Jones* (2) and relied upon the authority of what was said by Lord Alverstone C.J. in *Pearks, Gunston & Tee* v. *Houghton.* (3) But those remarks of Lord Alverstone C.J. were obiter dicta; they were not necessary for the decision of that case. What my brother Avory says in *Batchelour* v. *Gee* (1) is not obiter; it is the ground of his decision. But in order to overrule *Jones* v. *Jones* (2) he and the other members of the Court relied upon mere obiter dicta of Lord Alverstone C.J. and accepted them as their own reasons for their decision. I agree with the judgment of Rowlatt J. in *Batchelour* v. *Gee* (1) until he gave judgment in favour of the respondent. With the whole of his judgment down to the very conclusion of it I absolutely agree. I agree with all his reasoning, but it seems to me that the reasoning contained in his judgment ought to have led to his coming to an absolutely opposite conclusion. On p. 249 of the report in the *Law Reports* he says: "Further there is the serious argument of Mr. Macmorran that s. 8, except upon his construction, does not add anything to the protection which the vendor gets under s. 6. If it is brought to the mind of the person that the article is mixed, there is no offence under s. 6.

(1) [1914] 3 K. B. 242. (2) 58 J. P. 653.

(3) [1902] 1 K. B. 889.

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If it is brought to his mind that there is a notice affecting the article he cannot say that its contents were not brought to his mind merely because he did not read it. This seems to me a formidable argument against holding that it is necessary under s. 8 to bring to the mind of the person that there is a notice." My brother Avory had said that it was necessary to bring to his mind that there was a notice. My brother Rowlatt continuing said: "If the notice is brought to his mind then s. 8 carries the vendor's protection no further than s. 6." That is equivalent to saying that s. 8 is senseless and useless; but nobody has ever said that. Later in his judgment he pointed out in the following words that what Lord Alverstone C.J. said was obiter: "When the facts of the present case are considered they come within those dicta of Lord Alverstone C.J., and *Jones* v. *Jones* (1), whatever be its fate, cannot be treated as extending to cover this case." I think that upon all the reasoning of my brother Rowlatt to which I have called attention he should have differed in his conclusion from the other members of the Court. I think that in his reasoning he did differ from them absolutely. The only thing in which he did not differ from them was in his conclusion. I, myself, am of opinion that *Jones* v. *Jones* (1) was rightly decided and that there is no reason why we should follow the obiter dicta of Lord Alverstone C.J. in preference to a decision of the King's Bench Division in *Jones* v. *Jones*. (1) In answer to any contention that we ought to follow the dicta of Lord Alverstone C.J. I am perfectly satisfied with the reasons given by Rowlatt J. as showing why we should not. Therefore I think that this appeal should be dismissed.

BANKES J. I agree. We have to construe s. 8 of the Sale of Food and Drugs Act, 1875. That section is an exception from s. 6 which creates the offence, and its object is to afford protection to the vendor. Sect. 8 enacts that the vendor shall not be guilty of an offence if at the time of delivering the article he shall supply to the person receiving the same a notice, by a label distinctly and legibly written or printed on or with the article or drug, to the effect that the same is mixed. The

(1) 58 J. P. 653.

material time indicated by the section is the time of the delivery of the article. The person to whom the notice is to be given is the person to whom delivery is made. The form the notice is to take is that of a label, and the manner of giving the notice is by supplying a label to the person receiving the article. The sufficiency of the notice is secured by the provision that a label shall be on or with the article and that the requisite words shall be distinctly and legibly written or printed. If those conditions are complied with the vendor, in my opinion, comes within the protection of the statute. To comply with the provision that the vendor must supply the notice he must, in my opinion, if he supplies a label on the article, attach the label to the outside of the cover of the package in which the article is offered for sale, or if he supplies it with the article he must do so in some equally plain way, and he must not of course do anything to deliberately obscure the label in order that the purchaser might not become aware of its contents. In my opinion the mere wrapping up of the article for the purchaser's convenience or at his request before delivering it to the purchaser does not disentitle the vendor to the benefit of the section. It follows from what I have said that in my opinion the decision in *Jones* v. *Jones* (1) was right and that in *Batchelour* v. *Gee* (2) wrong. I do not agree with the view expressed in *Batchelour* v. *Gee* (2) that in addition to supplying the statutory notice—that is, a notice contained on the label—the vendor has to bring that label in some way to the attention of the purchaser.

AVORY J. I have been willing to be convinced that I was wrong in the judgment which I gave in *Batchelour* v. *Gee* (2), in order to secure unanimity in the decision of this Court upon the question which is of considerable importance, but in the result I am convinced by the argument in the present case that I was right in *Batchelour* v. *Gee* (2), and I think the judgments which have been delivered to-day and those which I am aware are about to be delivered to the contrary will destroy the usefulness of the Sale of Food and Drugs Act, 1875. I think that the main object of the Act has been overlooked, and I prefer, without

(1) 58 J. P. 653. (2) [1914] 3 K. B. 242.

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repeating any words of my own in *Batchelour* v. *Gee* (1), to adopt those which were used by my brother Shearman in that case at the conclusion of his judgment, where he said that the decision he was then giving was in line with the scheme of the Act which was designed to ensure that the buyer shall get what he asks for, and that if the seller wishes to supply something different he must inform the purchaser of his intention before the goods are delivered.

I have no doubt that in the present case the goods were delivered within the meaning of the Act at the time when they were handed over in the brown paper to the purchaser. At that time there was no information given to the purchaser that he was being supplied with something different from that which he had asked for. The purchaser had asked for coffee. When a person asks for coffee he ought to be supplied with coffee, and if a shopkeeper or vendor who is asked for coffee chooses to supply something different (and a mixture of coffee and chicory is something quite different from coffee) I think that the statute casts upon him the duty of bringing to the mind of the purchaser at the time of delivery the fact that he is delivering something different, or that what he is delivering has a label on it which the purchaser may read if he chooses to do so.

I only wish to add—because I am not going to repeat anything I said in *Batchelour* v. *Gee* (1)—that I think there is also a misapprehension in dealing with s. 8, as it has been dealt with, as an additional protection afforded to the vendor in all cases. Sect. 8 does not apply to all cases which come within s. 6. It is limited to those cases where the sale is of an article of food which is mixed with some matter or ingredient not injurious to health and not intended fraudulently to increase the bulk. It is only in those particular cases that s. 8 has any application. In a case for instance where the food or drug is mixed with some matter which is injurious to health, it would be no answer for the vendor to say that he supplied a label; and limiting s. 8 to particular cases, I remain of the same opinion that I expressed in *Batchelour* v. *Gee*. (1) I cannot agree that the remarks of Lord Alverstone C.J. in *Pearks, Gunston & Tee* v. *Houghton* (2)

(1) [1914] 3 K. B. 242. (2) [1902] 1 K. B. 889.

upon which my judgment was based were obiter dicta. I think they were part of the decision in that case.

LUSH J. I am of opinion that this appeal should be dismissed. It seems to me that the argument for the appellant involves the consequence that not only is the seller deprived of the benefit which he obtains under s. 8, but the whole of the provisions of s. 8 are rendered absolutely nugatory. If the true meaning of s. 8 is that the seller must actually communicate to the buyer at the time of delivery what the quality and substance of the goods are which he is delivering—if that is essential—then s. 8 was not required at all, because s. 6 has already covered and dealt with that condition of things. Of course, if the seller makes known to the buyer that he is delivering something different from that which the buyer demanded and truly communicates what it is he is delivering, then no offence has been committed under s. 6, and s. 8 is not required. On the other hand, if one adopts the view taken in *Batchelour* v. *Gee* (1), I do not understand what s. 8 means. Sect. 8 was wanted—and it is very important—in order to give to the seller an opportunity, provided he acts honestly, of protecting himself against proceedings under the Act by a method which is free from and independent of all controversies and disputes which might take place as to what occurred when any article was bought. That is the object of s. 8, and the very language of the section appears to indicate, not that a personal communication must be made to the buyer, but that the seller in order to avail himself of the protection must put on a clear and legible label containing a notice as to what the goods are that he is delivering. There is nothing in s. 8 about giving notice to the buyer, and the language of the section when it speaks of supplying a notice by a label appears to me to point to this, that it is the supplying the label which protects the seller, and not the communication to the buyer as to the nature of the goods to be delivered.

There is another answer which seems to me to be equally conclusive, namely, that the label was temporarily covered by a wrapper for the benefit, and at the implied request, of the buyer. It seems to me that it is impossible to hold that a buyer, who

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asks either expressly or impliedly to have the label merely temporarily covered by a wrapper which is put on the goods to enable him to remove them more conveniently, can turn round and say to the seller "You had no business to obscure what was written on the label." I think that *Jones* v. *Jones* (1) was rightly decided, and I cannot agree with *Batchelour* v. *Gee*. (2) I therefore think that this appeal fails.

ATKIN J. I agree. It is plain that s. 6 gives the right of protection to the purchaser who purchases food and drugs. By that section it is an offence to sell to the prejudice of the purchaser any article of food or drug not of the nature, substance, and quality of the article demanded by the purchaser. At the same time, if the seller can prove that the purchaser had notice in fact that the article was adulterated or mixed, he cannot then be heard to say that the article was purchased by him to his prejudice. Notice in fact, therefore, is always a defence under s. 6. Sect. 8 is intended to give protection to the seller in certain cases, and I think that the object of the section was to provide that the seller would be protected if he took certain precautions which would or might amount to something less than notice in fact to the purchaser that the goods were mixed. As I read the section, it is sufficient if at the time the seller is delivering the article he supplies a notice. The notice which he has to supply is a label. The person to whom he has to give it is the person receiving the article, and the label must be supplied on or with the article or drug and must have distinctly and legibly written or printed on it words "to the effect that the same is mixed."

Now in those circumstances, if the seller complies with those provisions, it appears to me that no question arises as to whether the purchaser or the person receiving the article—who I think it is contemplated may be somebody other than the purchaser—had notice in fact that the article was mixed. I think that the label which must be on or with the article or drug must be so supplied on or with the article that, when the article is looked at, the label is capable of conveying notice that the

(1) 58 J. P. 653. (2) [1914] 3 K. B. 242.

article is mixed; in other words it will not do to conceal the label in the article or supply it so confused with other matter that it is not reasonably capable of conveying notice. But subject to that, I think that the seller is protected if he does supply to the person receiving the article the label as mentioned in the section.

It is quite unnecessary in my view that the seller should proceed to go on and give notice to the purchaser that there is a label upon the article. It is not necessary for the person receiving the article to look at the label. It is not necessary to show that he saw the label. He may reserve the opportunity of looking at the label to some later stage when he wishes to use the article, and in those circumstances I see no reason for holding that the seller must supply a notice to the purchaser or the person receiving it that there is a label. I agree, therefore, with the decision in *Jones* v. *Jones*. (1)

I wish to add further that I agree with what my brother Lush has said, and that in any case, in my opinion, where the label has been obscured at the request of the purchaser or the person receiving the goods either express or implied, the purchaser cannot then complain and say that there has been no performance of the requirements of s. 8. I therefore agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *W. T. Ricketts & Son.*
Solicitors for respondent: *Neve, Beck & Kirby.*

(1) 58 J. P. 653.

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June 12, 23;
Dec. 18.

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Rates—Non-payment of—Application for Distress Warrant—Jurisdiction of Justices to hear and determine Defences.

On the hearing of an application for a distress warrant for non-payment of rates the justices have jurisdiction to hear and determine any defence alleging either that the defendant ought not to have been rated at all, or that, if he was rateable at all, he ought not to have been rated upon the full rateable value; and they may entertain such a defence whether the facts necessary to establish it are undisputed or not.

So *held* by Bray and Atkin JJ. (Avory J. dissenting).

A statute exempted certain property from all "parochial rates":—

Held, that the exemption did not extend to general district rates.

Case stated by justices of Middlesex.

A complaint was preferred by Cecil Whenman, an assistant overseer of the poor for the parish of Hampton Wick and collector of the general district rates for the urban district of Hampton Wick, against Mathew Clark, the respondent, for non-payment of two sums of 3*l.* 18*s.* 10*d.* and 2*l.* 10*s.* 2*d.* alleged to be due from him for poor rate and general district rate respectively. The justices refused to make an order for the payment of either of the said rates and dismissed the complaint subject to the following case:—

1. The said rates were duly made and demanded of the respondent.

2. The respondent is and was at all material times the occupier of a house and grounds known as "The Wilderness" in the parish of Hampton Wick, and the said rates were assessed upon him as such occupier.

3. When the facts above stated had been proved by the appellant and whilst the appellant was still in the witness-box counsel for the respondent cross-examined the appellant and asked him if he had not received in answer to the demand note for the said rates two letters, one from the respondent dated November 3, 1913, and one from the solicitor to the conservators of the river Thames dated November 4, 1913, in which letters it was claimed that the said house and grounds were the property

of and were vested in the conservators, and that by virtue of the provisions of s. 289 of the Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), the said house and grounds were exempt from the said rates, and the respondent was exempt from paying the rates as the occupier thereof. The appellant admitted that he had received the said letters and produced them before the justices.

4. Counsel for the appellant thereupon contended that the respondent was not entitled before the justices to rely upon the provisions of the said section upon the ground that they had no jurisdiction in proceedings for the recovery of poor rate or general district rate to inquire whether the said provisions applied so as to exempt the premises and the respondent from the payment of the said rates. Counsel for the respondent contended that the justices had such jurisdiction, and that all the evidence which the appellant or the respondent desired to give should be laid before them before they decided the question of jurisdiction.

5. The justices decided to determine the question of jurisdiction before they heard further evidence, and after consideration they were of opinion that they had such jurisdiction and decided to hear further evidence.

6. After they gave the decision in paragraph 5 the following further facts were proved. The said house and grounds are an ordinary private residential house with a garden, and are situate a few yards from the bank of the river Thames and from the towpath upon the said bank, and are also situate at a point about twenty-one miles above London Bridge. The towpath is situate between the river Thames and the said house and grounds. The house and grounds are fenced off from the towpath. The respondent is not and was not at any material time an official of the conservators. The house and grounds are not at present and have not at any material time been used for any purpose in helping the navigation of the river Thames, or for any purpose connected with the conservancy of the river or with any lock or towpath or other works of the conservators. The house and grounds were transferred, and are included in the records handed over, to the conservators by the mayor,

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commonalty, and citizens of the city of London in 1857 pursuant to s. 135 of the Thames Conservancy Act, 1857. The conservators have continued to hold the premises and have received rent therefor ever since the year 1857. The rent is carried to the account of the conservators relating to the navigation of the river Thames above London Bridge and is and has been used and applied by the conservators for one or other purpose of the said river. The lease under which the respondent holds the house and grounds was granted to him by the conservators on June 20, 1913. The occupiers of the house and grounds had been rated in all the rates made for the parish and district from the year 1862 to the making of the rates in question, and there was no record of any previous refusal to pay such rates. No rates have been paid in respect of the house and grounds by the conservators, who have never been the occupiers of the premises.

7. The material portions of s. 289 of the Thames Conservancy Act, 1894, are as follows: "Notwithstanding anything in any Act and notwithstanding any custom to the contrary all tolls which for the time being may be demanded and received by the conservators under this Act in respect of the Thames above London Bridge, and all lands buildings locks pounds towpaths bridges ferries and works for the time being vested in the conservators in respect of the Thames above London Bridge shall be exempt from all parochial charges rates taxes assessments impositions and payments whatsoever."

8. For the appellant it was contended that the house and grounds were not lands or buildings "for the time being vested in the conservators in respect of the Thames above London Bridge" within the meaning of the said enactment, and that the said enactment did not exempt the respondent from payment of the said rates or either of them. For the respondent it was contended that the said house and grounds were lands and buildings for the time being vested in the conservators in respect of the Thames above London Bridge within the meaning of the said enactment, and that by reason thereof the said house and grounds were exempt from all parochial charges and rates, including the rates demanded by the appellant, and that the

respondent was therefore exempted from payment of the said rates.

The questions for the opinion of Court are:

1. Whether in proceedings for the recovery of the said poor rate the justices had jurisdiction to take into consideration the provisions of s. 289 of the Thames Conservancy Act, 1894, and to inquire whether those provisions applied so as to exempt the said house and grounds from the said poor rate and the respondent from paying the said poor rate in respect thereof.

2. Whether in proceedings for the recovery of the said general district rate the justices had jurisdiction to take into consideration the provisions of the said section and to inquire whether those provisions applied so as to exempt the said house and grounds from the said general district rate and the respondent from paying the said general district rate in respect thereof.

3. Whether, assuming that the justices had such jurisdiction, they were entitled to refuse to make an order for the payment of either of the said rates.

Ryde, K.C., and *Konstam*, for the appellant. The justices had no jurisdiction to entertain the question of the statutory exemption claimed by the respondent. The only objections which a ratepayer can take to a poor rate on an application for a distress warrant are those which go to show that the overseers in rating him acted without jurisdiction; as for instance, (*a*) that the property in respect of which he is rated is not situate in the parish; (*b*) that the wrong defendant is brought before the Court, as where an owner is summoned instead of the occupier, or a caretaker is rated who is a mere servant; (*c*) where on the face of the rate itself it is defective, as where it appears not to have been allowed by two justices, or has been allowed by justices of the wrong county; (*d*) where a defect though not appearing on the face of the rate is admitted to exist. It may be that where the defect in the overseers' jurisdiction arises from the fact that the defendant is exempted from liability to the rate by the very statute which gives the power to make the rate, that matter also may be raised on the application for a distress

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warrant. But no such defence of statutory exemption can be set up before the justices if it is claimed to arise under some other statute than that creating the rate, even though it be a public general statute, and a fortiori can it not be set up if the exempting statute is a special Act. This was expressly decided in *Birmingham* v. *Shaw*. (1) There the president of a literary society claimed an exemption from poor rates under the Literary Societies Act, 1843, but it was held that he could not rely on such exemption on the hearing of a complaint for non-payment. It is matter of appeal to quarter sessions. Lord Denman said that a good reason for not allowing such an exemption to be set up except on appeal was that "the party rated had many facts to prove, and a construction of the statute to make out, before he could establish his exemption." In *Reg.* v. *Hannam* (2), on an application for an order for payment of a rate made under the Public Health Act, 1875, it was held by the Court of Appeal that the exemption of the property from payment of rates under s. 37 of the Harbours Act, 1861, could not be inquired into. Lord Esher there laid it down that the justices cannot entertain an objection to the validity of the rate on any ground which is matter of appeal to quarter sessions. It is true that Bowen L.J. said "I desire to reserve a further possible exception, upon which I express no opinion, namely, where the exemption from rating is enacted by a Public Act of Parliament of which the whole world has notice, and which the rating authority must or ought to know, and which as soon as the statute is read destroys the rateability without throwing any onus upon the occupier of proving anything so as to gain the exemption for his property. I am not sure whether the justices may not in that case refuse to enforce the rate. I desire to reserve my opinion upon it." That passage has since been treated in *Rayner* v. *Drewitt* (3), *Dixon* v. *Blackpool and Fleetwood Tramroad Co.* (4), and *Wixon* v. *Thomas* (5) as if it were an authoritative ruling. But that is a mistake, for it only professed to be a suggestion. Probably Bowen L.J. was referring to an express exemption of a

(1) (1849) 10 Q. B. 868.
(2) (1886) 34 W. R. 355.
(3) (1900) 82 L. T. 718.
(4) [1909] 1 K. B. 860.
(5) [1911] 1 K. B. 43.

specific piece of property, in which case there would be nothing for the defendant to prove nor any disputable construction of the Act to make out; otherwise it would be in direct conflict with the ruling of Lord Denman in *Birmingham* v. *Shaw* (1) which the Court there purported to approve. Here the defendant would have to prove that the property was vested in the conservators and make out his construction of the statute. In *Sheffield Waterworks Co.* v. *Sheffield Corporation* (2) it was held to be a "sufficient cause for non-payment" of a district rate within s. 256 of the Public Health Act, 1875, that the poor rate valuation list on which the district rate is based had been admitted by the assessment committee to be excessive. But there the district rate was bound to follow the poor rate valuation list, and the defendants consequently had no disputable matter to prove. In *Fourth City Mutual Building Society* v. *East Ham* (3) it was held under s. 13, sub-s. 11, of the Interpretation Act, 1889, that justices on an application for a distress warrant for non-payment of poor rates might inquire whether there was any power to rate the owner instead of the occupier and to state a case for the opinion of the Court. But that was a case of the wrong party being summoned, which the defendant was always at liberty to show. It was not there meant to decide that the Interpretation Act had enlarged the scope of the justices' jurisdiction. In *Westminster Corporation* v. *Army and Navy Auxiliary Co-operative Supply* (4) an objection that the defendants had had no notice of increase in their rateable value as required by s. 9 of the Valuation (Metropolis) Act, 1869, was held to be not one that could be taken on an application to enforce the rate, but must be the subject of an appeal against the rate. In *Dixon* v. *Blackpool and Fleetwood Tramroad Co.* (5) it was for the first time held that an admission by the rating authority, as distinguished from proof, of facts going to show that the property in question was not liable to be rated at the full rateable value entitled the justices to inquire into the propriety of the rate. That distinction between facts admitted and facts requiring to be

(1) 10 Q. B. 868.
(2) (1885) 55 L. J. (M.C.) 40.
(3) [1892] 1 Q. B. 661.
(4) [1902] 2 K. B. 125.
(5) [1909] 1 K. B. 860.

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proved cannot be questioned in this Court, though in a higher Court it would be contended that it was unsound. In that case Bigham J., who dissented from the rest of the Court, was of opinion that admissions could not affect the justices' jurisdiction. This distinction between undisputed facts and facts requiring proof was again approved by the Court in *Wixon* v. *Thomas* (1), the suggestion thrown out by Bowen L.J. in *Reg.* v. *Hannam* (2) being again treated as an authoritative decision that an exemption from rating created by a public general Act may be relied upon before the justices as an excuse for non-payment. But that, as already pointed out, is a misconception; he only reserved the point as one open for future discussion. The case of *Birmingham* v. *Shaw* (3) is still good law and covers the present case.

Secondly, if the justices had jurisdiction to inquire into the exemption claimed they ought to have held that the land in question was not exempt. It is not "vested in the conservators in respect of the Thames above London Bridge." Those words mean that the land must be vested in the conservators for the purposes of the conservancy, in connection with the navigation. The words "lands" and "buildings" are grouped in the section with "locks pounds towpaths bridges" and "ferries." The maxim noscitur a sociis applies. Here the land is not used for the purposes of the navigation at all. It is used by the respondent as ordinary residential premises. If this limitation is not to be put upon the exemption, and if the conservators are entitled to use the land for any purpose they please and yet retain the benefit of the exemption, the effect will be that no meaning whatever is given to the words "in respect of the Thames." In any case the exemption only applies to parochial rates, and the general district rate is not a parochial rate. It was expressly so decided in *Richards* v. *Kidderminster*. (4)

McCall, K.C., and *Marriott*, for the respondent. The property is exempt from both poor rates and general district rates. The word "parochial" in s. 289 was intended only to qualify the immediately succeeding word "charges" and not the word "rates." But suppose that it does qualify the word "rates,"

(1) [1911] 1 K. B. 43.
(2) 34 W. R. 355.
(3) 10 Q. B. 868.
(4) [1896] 2 Ch. 212.

the district and the parish are conterminous, and consequently the expression "parochial rates" would include the general district rate. Although it is not so stated in the case the fact is not disputed that this land was acquired by the London Corporation in their capacity as conservators of the river, and that is enough to satisfy the condition as to the land being vested in them "in respect of the Thames." By s. 181 of the Act of 1894, the conservators have power to sell or lease any land vested in them as in their judgment is not required for the purposes of the Act. They are not required to sell the superfluous land; they may lease it for any purpose they choose. The land does not cease to be vested in them in respect of the Thames, and they do not lose the exemption in respect of it merely because they adopt one alternative rather than the other.

On the question of the justices' jurisdiction to deal with the exemption claimed, great inroads have been made upon the decision in *Birmingham* v. *Shaw* (1) by later cases. The judgment of Bowen L.J. in *Reg.* v. *Hannam* (2) is the starting point of a line of decisions which bind this Court. The duty of the justices on an application to enforce a rate is not ministerial only: *Reg.* v. *Thornton* (3); they may state a case on the question of the defendant's liability: *Reg.* v. *Mayor of London* (4); *Fourth City Mutual Building Society* v. *East Ham* (5); and for that purpose they must necessarily enter upon the inquiry. In *Rayner* v. *Drewitt* (6), where the defence was that a building partially used as a drill hall was exempt from rates as being used for Crown purposes, Bigham J. said: "If he"—the person rated—"could have shown that the building was wholly exempt from rates either by common law or by statute the justices would have been bound to refuse to issue their warrant for the payment of the rates." That case is directly in point here. In *Dixon* v. *Blackpool and Fleetwood Tramroad Co.* (7), where an urban district rate was assessed upon a tramroad upon its full rateable value and the assistant overseer admitted that the tramroad

(1) 10 Q. B. 868.
(2) 34 W. R. 355.
(3) (1892) 8 Times L. R. 555.
(4) (1887) 52 J. P. 70.
(5) [1892] 1 Q. B. 661.
(6) 82 L. T. 718.
(7) [1909] 1 K. B. 860.

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was a railway and consequently was entitled under the Public Health Act to be rated on two-thirds of its value only, the Court held that the justices had jurisdiction to refuse to issue their warrant for the full amount. They went on the ground that the company claiming the exemption had nothing to prove. That case was followed in *Wixon* v. *Thomas* (1), where Lord Alverstone formulated the rule thus: "If on the admitted and undisputed facts before the justices it follows as a matter of law that the name of the person rated or that of the property in respect of which he is rated ought never to have been inserted in the rate-book, the justices are not bound to issue a distress warrant, the overseers in such a case having acted without jurisdiction. But if some fact has yet to be determined before it can be said that the name of the person rated or the property ought not to have been inserted in the rate-book, the question must be determined on appeal, and not on an application for a distress warrant." Whether the rule so stated must be understood as limited to admitted facts is not quite clear, for on p. 46 the facts necessary to establish the exemption were stated to be "proved or admitted," and the Court acted upon those facts. It is contended that if there is evidence of facts, necessary to bring the defendant within the exemption, which facts are uncontradicted although not admitted, that is enough to give the justices jurisdiction. To hold otherwise would lead to great difficulty. One great advantage in allowing the justices to enter upon the inquiry, and, in the event of a dispute only upon the law, to state a case for the Court, is that such procedure is much cheaper and more convenient than that of an appeal to quarter sessions.

Ryde, K.C., in reply.

Cur. adv. vult.

ATKIN J. read the following judgment, in which BRAY J. concurred:—In this case the appellant, an assistant overseer for the parish of Hampton Wick and collector of the general district rates for the urban district council of Hampton Wick, preferred a complaint against the respondent for non-payment of poor rate

(1) [1911] 1 K. B. 43, at p. 52.

and general district rate, he being a person alleged to be duly rated and assessed to the relief of the poor of the said parish. On the complaint coming to be heard before the justices the respondent claimed that he was exempt from rates on the ground that the house of which he was the occupier was vested in the conservators of the river Thames in respect of the Thames above London Bridge within the meaning of s. 289 of the Thames Conservancy Act, 1894. It was objected on the part of the appellant that the justices had no jurisdiction to entertain such a defence, which could only be raised on appeal against the rate. Upon the point being overruled by the justices, the appellant contended that the premises in question were not exempt under s. 289, or, if they were, were only exempt from the poor rate, and that the district rate was not a parochial rate. The justices determined these points also against the appellant, and upon a case stated by them we have now to determine the points raised therein, which include all the points mentioned above.

For the purpose of deciding the preliminary point it is necessary to consider the history of the premises. The facts are stated in paragraph 6 of the case. [He read the paragraph.] The premises are undoubtedly vested in the conservators, and vested in them by reason of the operation of s. 135 of the Thames Conservancy Act, 1857, which transferred the property therein mentioned from the City Corporation to the conservators. The Corporation derived its powers of acquiring land and buildings for the purposes of the Thames navigation by, amongst other Acts, a series of Acts dealing with, and entitled Acts for, the better navigation of the Thames westward of London Bridge; and there can be no doubt, and the justices must be taken to have found, that the Corporation originally acquired the premises in question under one or other of such Acts. If this be so, in our opinion the premises, so long as they remained vested in the conservators, were vested in the conservators in respect of the Thames above London Bridge, and were, under the section, exempt from parochial charges. It was contended that the words in the section should be construed as meaning vested in the conservators and used by them for the purposes of the navigation of the Thames above London Bridge. We can see no

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good reason for adopting this construction, which is not the natural construction, and could easily be expressed by the words "vested and used" if that was the intention of the Legislature. We think, therefore, that the premises are, while in the present ownership, totally exempt from parochial charges, regardless of any purposes for which they are occupied or used.

It was necessary to examine this point before dealing with the preliminary question of jurisdiction, as it was admitted on both sides that much depended upon the nature of the objection taken. It was admitted by the appellant that upon a summons before justices for non-payment of poor rate, though there had been no appeal against the rate, the defendant could raise several defences which the justices would have jurisdiction to determine:—1. That the property was not within the overseers' parish. 2. That the defendant was not occupier. 3. That the rate was defective on the face of it—e.g., did not purport to have been allowed by two justices. 4. That the defect relied on was admitted by both parties. 5. That the premises were occupied in the service of the Crown. 6. Possibly, that the rate on the face of it was in conflict with some exempting section in the statute imposing the rate—e.g., if a railway company were assessed at the full value to a general district rate. It was contended, however, that except in the above cases no defence of exemption could be raised by a defendant; and in particular that he could not rely upon an exemption under a statute other than that creating the rate. Numerous cases were cited before us on behalf of both parties. The appellant relied mainly upon *Birmingham* v. *Shaw* (1) and *Reg.* v. *Hannam.* (2) The respondent relied mainly upon *Dixon* v. *Blackpool and Fleetwood Tramroad Co.* (3) and *Wixon* v. *Thomas.* (4) In the last case Lord Alverstone, after referring to the numerous authorities, formulated the rule thus: "If on the admitted and undisputed facts before the justices it follows as a matter of law that the name of the person rated or that of the property in respect of which he is rated ought never to have been inscribed in the rate-book, the justices are not bound to issue a distress warrant, the overseers in such case having acted

(1) 10 Q. B. 868.
(2) 34 W. R. 355.
(3) [1909] 1 K. B. 860.
(4) [1911] 1 K. B. 43.

without jurisdiction." (1) The jurisdiction of the overseers cannot depend upon what is subsequently admitted or upon proof is undisputed before the justices on proceedings to enforce the rate; and if the justices have power to examine the jurisdiction of the overseers (as we think they have) it seems difficult to see upon what logical principle the power of the justices is limited to examination only of relevant facts that are admitted or undisputed. It is not only illogical but inconvenient, because, if the jurisdiction of the justices is to depend on what the applicant may admit or not dispute, the respondent will not know before he comes into Court whether he has a good answer or not. It is not indeed suggested but that as to some facts going to jurisdiction, such as actual occupation or position outside the parish, the justices may hear and determine a contest between the parties. We think the rule promulgated in *Wixon* v. *Thomas* (2), which did not purport to cover all the cases, cannot be considered to be final. In *Reg.* v. *Hannam* (3) Lord Esher and Cotton L.J. laid down a rule that where there can be an appeal to quarter sessions the justices have only to enforce the rate, and are bound to assume the rate to be good if the property is within the district. This was in the year 1886, and if this rule had been uniformly acted on since we should have been bound to follow it, but the cases which I have mentioned show that this is not so, and that other exceptions have been made, and it is open to this Court to lay down a general rule which will embrace these exceptions; and we think the rule to be laid down is that the justices have jurisdiction if the question is whether the defendant ought to have been rated at all, or, if at all, for the full rateable value. If the overseers have rated premises which ought not to be rated at all or for the full value, or have not given effect to an exemption total or partial, quoad tantum they have exceeded their powers; and this is so whether the exemption is created by statute or by common law. There is nothing in the words of the statute which forbids the rule. The statute says that if no sufficient cause for non-payment is shown the justices may make no order. The words "no sufficient cause for non-payment is shown" are quite

(1) [1911] 1 K. B. at p. 52. (2) [1911] 1 K. B. 43.
(3) 34 W. R. 355.

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wide enough to admit of this rule. The summons for non-payment is a cheap and convenient way of raising the point. The process is much quicker and less expensive than an appeal to sessions, and in view of the fact that the justices can state a case seems free from objection. On this ground the preliminary point must be held to be bad. We have already held that the premises in question are within the exemption clause, and it only remains to consider whether the clause exempts the respondent from both general district rate and poor rate. It was not contended before us that if the section applied the poor rate was not a parochial rate, but it was urged that the general district rate did not fall within the exemption. We think that this contention is sound. It was admitted before us, though not so found in the case, that in this district the boundaries of the parish and the urban district are conterminous. Nevertheless we think that the general district rate, which is not historically a parish rate, not levied by parish authorities, and only by accident levied upon the inhabitants of only one parish, cannot be included in the words "parochial rates" in a statute passed in 1894, which in another section uses words drawing a distinction between "parochial" and "other local rates."

For these reasons we answer the questions put to us in the affirmative as to 1 and 2, and as to 3 in respect of the poor rate. The case must be remitted to the justices to make an order as to the general district rate.

AVORY J. read the following judgment:—The respondent in this case claims exemption from the poor rate of the parish and general district rate of the urban district of Hampton Wick under s. 289 of the Thames Conservancy Act, 1894. He is, and was at the time of the making of the said rates, the occupier of the house and grounds known as "The Wilderness" in the said parish, which abut upon and are fenced off from the towing path of the river Thames. The said house and grounds are assumed to have been purchased by the mayor and commonalty and citizens of the city of London under the powers conferred on them by the 54 Geo. 3, c. ccxxiii., or earlier Acts, for the purpose of making the said towing path, and were transferred to the

conservators of the river Thames in 1857, pursuant to s. 135 of the Thames Conservancy Act, 1857. No part thereof has at any time been used for any purpose connected with the navigation or conservancy of the river Thames, but the said house and grounds have since the year 1857 been let at a rent by the said conservators, which rent has been applied by the conservators to the purposes of the navigation or conservancy of the river, and the occupiers of the said house and grounds have since the year 1862 paid all rates made for the said parish and district. The main question to be determined is whether the said house and grounds are "lands or buildings for the time being vested in the conservators in respect of the Thames" within the meaning of s. 289 of the Thames Conservancy Act, 1894. The section is in substitution for s. 19 of the repealed Act 54 Geo. 3, c. ccxxiii., in which the exemption is limited to "lands, buildings, &c., vested for the purposes of the said navigation," and the proviso to s. 289 as to compensation to be paid for parochial taxes is limited to lands purchased or used for the purposes of the Act, which proviso is in substitution for s. 23 of the Act of 1814, and in my opinion the words "vested . . . . in respect of the Thames" ought to be construed in the limited sense contended for by the appellant, that is to say, "vested for the purpose of the navigation or conservancy of the river," and that the exemption does not extend to superfluous lands not required for such purposes which the City of London Corporation presumably purchased because the owner refused to sell the portion only required for the towpath, and which they and the conservators have been at all times at liberty to sell or let on lease. It is not suggested that compensation for the parochial taxes or rates payable in respect of the said house and grounds at the time they were acquired has been at any time paid by the conservators or the City of London Corporation. In my opinion the compensation clause is intended to be correlative to the exemption, and I do not think that superfluous lands purchased under compulsion are lands purchased for the purposes of the Act within the meaning of this compensation clause. The contrary view appears to me, with all respect to the majority of the Court, to give no effect to the words "in respect of the Thames." With regard to

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the general district rate I think that is not a parochial rate within the meaning of s. 289, and therefore is not in any case within the exemption, notwithstanding that the parish and district happen in this case to be conterminous.

The further question is whether the justices had jurisdiction to determine the validity of the claim to exemption on the application for a distress warrant, and it is said that the principle laid down by Lord Denman in *Birmingham* v. *Shaw* (1), which has been regarded as a leading case on the subject, has been extended or enlarged by subsequent decisions, and particularly *Dixon* v. *Blackpool and Fleetwood Tramroad Co.* (2) and *Wixon* v. *Thomas* (3), in which the reservation made by Bowen L.J. in the case of *Reg.* v. *Hannam* (4) appears to have been treated as an authoritative decision, but it is to be observed that this reservation only applied to a case where the exemption obviously attached to some hereditament on the face of a statute, and the judgment in the case of *Birmingham* v. *Shaw* (1) was approved by the Court of Appeal. Under these circumstances I think we are bound by the judgment of the Court of Appeal in *Reg.* v. *Hannam* (4) to hold that the passage in the judgment of Lord Denman (5) which was cited to us applies to this case, where he says that if the person summoned has facts to prove and a particular construction of the statute to contend for, then the justices have no jurisdiction. In this case the respondent had to prove that the house and grounds were still vested in the conservators, and had to contend for a particular construction of the statute. It is important, I think, that this jurisdiction of the justices should not be extended so as to allow questions which ought only to be determined on appeal to quarter sessions against the rate to be determined by justices on application for a distress warrant after the time for appeal has expired.

Appeal dismissed as to the poor rate and allowed as to the general district rate.

Solicitor for appellant: *H. Fawssett.*

Solicitor for respondent: *G. G. Corble.*

(1) 10 Q. B. 868.
(2) [1909] 1 K. B. 860.
(3) [1911] 1 K. B. 43.
(4) 34 W. R. 355.
(5) 10 Q. B. at p. 881.

J. F. C.

DONCASTER UNION, Appellants *v.* WOOLWICH UNION, Respondents.

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Nov. 27.

Poor Law—Settlement—Residence of Children under Sixteen with Father—Removability of Father—Father not chargeable—Removability of Children—Poor Removal Act, 1795 (35 *Geo.* 3, *c.* 101), *s.* 1—*Poor Removal Act*, 1846 (9 *&* 10 *Vict. c.* 66), *ss.* 1, 3—*Poor Removal Act*, 1848 (11 *&* 12 *Vict. c.* 111), *s.* 1—*Divided Parishes and Poor Law Amendment Act*, 1876 (39 *&* 40 *Vict. c.* 61), *s.* 34.

The Poor Removal Act, 1795, s. 1, provides that no poor person shall be removed, by virtue of any order of removal, from the parish where such poor person shall be inhabiting to the place of his last legal settlement, until such person shall have become actually chargeable to the parish in which such person shall then inhabit.

Under s. 1 of the Poor Removal Act, 1846, as amended, no person shall be removed from any parish in which such person shall have resided for one year next before the application for the warrant of removal, provided that the time during which such person shall be serving His Majesty in the Navy shall be excluded in the computation of time. By s. 3 no child under sixteen residing in a parish with his or her father shall be removed from the parish in any case where the father may not lawfully be removed from the parish.

Two children under the age of sixteen resided with their father, who was a sailor in the Royal Navy, in the Medway Union continuously from 1903 to 1913. Previously to 1903 the father was legally settled in the Doncaster Union. The father never became chargeable in the Medway Union. The children having become chargeable in the Woolwich Union, an order was made adjudging that their last legal settlement was in the Doncaster Union, and ordering their removal to that union:—

Held, that the father, by reason of his being a sailor, never acquired a status of irremovability in the Medway Union and was always removable from that union, although under s. 1 of the Act of 1795 he could not in fact have been removed until he had become chargeable; that the father being removable, the children were also always removable; that the children, therefore, did not obtain a settlement in the Medway Union by residence under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876; and that the children's last legal settlement was in the Doncaster Union.

Special Case stated pursuant to 12 & 13 Vict. c. 45, s. 11.

On February 12, 1914, the respondents, the Guardians of the Poor of the Woolwich Poor Law Union, obtained an order from a metropolitan magistrate sitting at Woolwich by which it was

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adjudged that the parish of Doncaster in the Doncaster Poor Law Union was the last legal settlement of Mary Elizabeth Holmes, aged twenty-eight years, and her three lawful children, Olive Mary, aged nine years, George William, aged five years, and Doris, aged two years, which children were then receiving relief from the Woolwich Union; and by the said order the appellants, the Guardians of the Poor for the Doncaster Poor Law Union, were ordered to receive and provide for Mary Elizabeth Holmes and her said three children. The appellants gave due notice of appeal to quarter sessions against the order in so far as it adjudged the last legal settlement of Olive Mary Holmes and George William Holmes to be in the parish of Doncaster. Subsequently by consent of the parties and by order of Scrutton J. this special case was stated.

The facts stated in the case were as follows:—

Mary Elizabeth Holmes was the lawful wife of George Holmes, to whom she was married at St. John's Church, Chatham, Kent, on June 23, 1903.

At the date of the marriage George Holmes was legally settled in the parish of Doncaster in the appellant union.

Olive Mary Holmes, George William Holmes, and Doris Holmes were the lawful children of George Holmes and Mary Elizabeth Holmes.

From the time of his marriage down to 1914, excepting for a few weeks between September and November, 1911, George Holmes served the Crown as a sailor, being a stoker in the Royal Navy, on one or other of the war vessels stationed in His Majesty's Dockyard at Chatham and cruising at times in home waters, and when on shore he always resided with his wife and children.

From the time of his marriage until April, 1908, George Holmes continuously resided with his wife in the parish of Chatham in the Medway Union.

In April, 1908, he removed from Chatham to the parish of St. Margaret, Rochester, in the Medway Union, where he resided continuously with his wife until 1913.

The child Olive Mary Holmes was born on June 8, 1904, in Chatham, and thereafter continuously resided in that parish

with her parents from the date of her birth until April, 1908; from which date she continuously resided with her parents in Rochester until 1913.

The child George William Holmes was born on May 1, 1908, in the parish of St. Margaret, Rochester, and thereafter continuously resided in that parish with his parents until 1913.

George Holmes never received parochial relief on his own account or on account of his wife or children; nor did he or they or either of them at any time otherwise become actually chargeable during the aforesaid terms of residence.

The respondents contended and the appellants denied that George Holmes could have been lawfully removed from the Medway Union at any time during his residence in Chatham and Rochester.

The appellants contended and the respondents denied that both Olive Mary Holmes and George William Holmes resided for the term of three years in the parish of St. Margaret, Rochester, in such manner and under such circumstances in each of such years as would, in accordance with the provisions of s. 3 of the Poor Removal Act, 1846 (9 & 10 Vict. c. 66), render them irremovable, and that they each acquired a settlement in, and were each legally settled in, the parish of St. Margaret, Rochester, pursuant to the provisions of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61).

If the Court should be of opinion that neither Olive Mary Holmes nor George William Holmes was settled in the parish of Doncaster in the appellant union, then the order of the magistrate was to be quashed. If the Court should be of opinion that both the children were settled in the parish of Doncaster, the order of the magistrate was to be affirmed.

Herbert Davey, for the appellants. The question is whether, as the appellants contend, the children resided in the Medway Union in such circumstances as would, in accordance with s. 3 of the Poor Removal Act, 1846, render them irremovable. If they did, then under s. 34 of the Divided Parishes Act, 1876, they acquired a settlement there. Sect. 1 of the Poor Removal Act, 1795 (35 Geo. 3, c. 101), provides that no poor person shall be

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removed from the parish where such poor person shall be inhabiting to the place of his last legal settlement "until such poor person shall have become actually chargeable to the parish" which the person then inhabits. These two children never became chargeable when residing in Rochester and Chatham, and therefore they could at no time have been removed from the Medway Union, and by reason of their residence they have acquired a settlement in that union under the Act of 1876. Further, under the proviso to s. 1 of the Poor Removal Act, 1846 (as amended by s. 1 of the Poor Removal Act, 1848 (11 & 12 Vict. c. 111)), children are only removable if their parents are removable. It is true that the father of these children being a sailor in the Royal Navy could not by reason of the first proviso to s. 1 of the Act of 1846 acquire a status of irremovability; but s. 3 of that Act provides that no child shall be removed from a parish "in any case where" the child's father or mother "may not lawfully be removed." That means that a child shall not be removed when the father in fact cannot lawfully be removed. It does not mean that the inability of the father to acquire a status of irremovability renders the child irremovable, if for some other reason the father in fact cannot lawfully be removed. Sect. 1 of the Act of 1795 rendered it impossible that the father could be removed from the Medway Union because he never became chargeable in that union. Although the father, being a sailor, could not acquire the status of irremovability, it does not follow that he could be "lawfully removed" within the meaning of s. 3 of the Act of 1846. For the same reason the mother was irremovable. It follows that the children were irremovable, and therefore under the Act of 1876 they acquired a settlement by residence in the Medway Union, and the order removing them to the Doncaster Union was wrongly made. [He referred to *Fulham Parish* v. *Woolwich Union* (1); *Hackney Union* v. *Kingston-upon-Hull Incorporation for the Poor* (2); *Tewkesbury Union* v. *Upton-on-Severn Union*. (3)]

Rawlinson, K.C., and *G. Rentoul*, for the respondents. In 1903 the father's settlement was in the Doncaster Union. He

(1) [1907] A. C. 255. (2) [1912] A. C. 475.
(3) [1913] 3 K. B. 475.

never acquired a settlement in the Medway Union, because admittedly during the whole period of his residence there he was unable to acquire a status of irremovability. He was therefore always removable from the Medway Union. If at any time while residing in that union he had become chargeable he could have been removed to the Doncaster Union. His wife, having lived with him all the time, was, under s. 1 of the Act of 1846 and s. 1 of the Act of 1848, also removable. It follows that the children were also removable. Therefore they did not (in the language of s. 34 of the Act of 1876) reside in the Medway Union for three years "under such circumstances in each of such years" as would render them irremovable. The appellants' contention based on the Act of 1795 is a novel one which has never been raised in any of the previous cases, and if sound it would render it impossible for a person ever to acquire a settlement by residence under s. 34 of the Act of 1876. The argument confuses the conditions under which removal can take place, dealt with by the Act of 1795, with the status of irremovability conferred by the Act of 1846. When the Act of 1846 says that a person shall be removable, it means shall be removable if and when he becomes chargeable. The Act of 1795 has nothing to do with the status of irremovability.

Herbert Davey in reply. The argument for the respondents entirely ignores the effect of s. 3 of the Act of 1846: *Reg.* v. *East Stonehouse.* (1)

RIDLEY J. The question in this case is whether, on the facts stated in the special case, the children were removable from the Medway Union. That depends in the main on whether the parents were removable. If the parents were removable, then the children were also removable; if the parents were irremovable, so were the children. For reasons which I will shortly state I have come to the conclusion that neither of the parents was irremovable and therefore the children are removable. By s. 3 of the Poor Removal Act, 1846, it was made unlawful to remove a child from a parish, when the parents of the child could not lawfully be removed from that parish. That section forms part

(1) (1854) 3 E. & B. 596.

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of a code which was enacted with the object of diminishing the possibility of removing paupers or persons who might become paupers. The section would have no application to the present case unless it could be made out that neither of the parents could lawfully be removed. If that were the case, the children would by virtue of s. 3 get the benefit of the irremovability of the parents. The question, therefore, to which we must direct our attention is whether or not the parents were irremovable. I will first consider the position of the father. He came from Doncaster when he married in 1903, and from that date down to 1913 he resided, when on shore, either at Chatham or Rochester; both those parishes are in the Medway Union. If he had not been in the Navy he would by reason of his residence in those parishes have acquired a status of irremovability in that union. But as he was in the Navy it follows from s. 1 of the Poor Removal Act, 1846, that he did not acquire a status of irremovability, but remained removable during the whole period of his residence in the Medway Union. It has been contended for the appellants that the Poor Removal Act, 1795, applies to this case. That Act prevents the removal of a pauper from a parish before he has in fact become chargeable in that parish. The argument put forward on behalf of the appellants is that the father of these children had not become chargeable in the Medway Union and that he was, therefore, irremovable. I think that argument is based on a fallacy. The Act of 1795 was not intended to affect status at all. What was aimed at was this. Previously to the passing of that Act, the fear or apprehension that a particular person might become chargeable in a parish in which he happened to be living frequently induced the parish authorities to cause him to be removed to some other parish. The Act of 1795 was directed at that state of things and was intended to prevent its occurring in the future. But it is impossible to read the Act as conferring upon a person a status of irremovability which he would not otherwise possess. Therefore the fact that the father in this case did not become chargeable in the Medway Union did not have the consequence of conferring upon him the status of irremovability, which by reason of his being a sailor his residence there did not give him.

I will now deal with the case of the mother of the children. We have to refer to the second proviso to s. 1 of the Act of 1846, or, rather, the proviso to s. 1 of the Act of 1848 which was substituted for it. As far as I can see there is very little difference between the two provisoes. The effect of the proviso is that if a man has a wife or children, the wife and children are to be removable or irremovable according as he is removable or irremovable. The object was to keep families together so far as is possible. Therefore, in this case, as the father was removable, it follows that his wife and children were also removable. For these reasons, the appeal in my opinion must be dismissed.

AVORY J. I am of the same opinion. These cases are always somewhat confusing, and, therefore, I will shortly state the reasons why I agree with the conclusion which Ridley J. has arrived at. The question raised by the case is, what is the last legal settlement of these two children? The magistrate held that it is in the Doncaster Union and he made an order for the removal of the children to that place. On behalf of the appellants, the Doncaster Union, it is contended that the children's settlement was in the Medway Union. The contention that the settlement is in the Doncaster Union depends on the argument that the children take the settlement of their father. The contention of the appellants depends on the construction of s. 34 of the Divided Parishes Act, 1876. The question is which of these two contentions is right. In order to establish the contention under s. 34 that the children's last legal settlement was in the Medway Union it must be shown that they have resided for three years in some parish in that union in such manner and under such circumstances in each of such years as would, in accordance with the several statutes in that behalf, render them irremovable. If that is established, then s. 34 says that they are "deemed to be settled therein." On the other hand, if the children were removable from the Medway Union in either of the three years, then they have not acquired a settlement there. It is said on behalf of the respondents that the children were in each of the three years removable from the Medway Union because their father was removable, and that it follows from ss. 1

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and 3 of the Poor Removal Act, 1846 (as amended by s. 1 of the Act of 1848), if the father is removable the children are also removable. In my opinion that Act is one which deals with the status of irremovability for this purpose. The father was, it is said, removable from the Medway Union because his original settlement was in Doncaster; he has since leaving Doncaster acquired no other settlement, and therefore if he had become chargeable in the Medway Union he would have been removable to Doncaster. On behalf of the appellants it is contended that, by reason of the provisions of the Act of 1795, the father was not removable. That Act introduced an amendment into the law by providing that a man should not be removed unless and until he actually became chargeable. In my opinion that Act has nothing whatever to do with the question of the status of irremovability, and when considering whether a particular person has or has not acquired a status of irremovability, it is no answer to say that, because he has never become chargeable and therefore could not in fact be removed, therefore he has acquired the status of irremovability, and that the Act of 1795 prevents the application of the Act of 1846. It is further contended that because the father was a sailor he never became removable under the Act of 1846. I do not myself appreciate the argument. The Act of 1846 says that the time during which a sailor is serving shall not count for the purpose of his acquiring a status of irremovability. That is very different from saying that a sailor shall never be removable. It may be an unfortunate result that a sailor while serving cannot acquire a status of irremovability, but when one is considering whether the father was removable in any of the three years of residence in the Medway Union, it seems to me quite clear that if he had become chargeable, while on shore, he would in law have been removable from the Medway Union to his last legal settlement, which was in the Doncaster Union. It follows that if the wife or children became chargeable they were also removable. The order appealed from was right, and the appeal must be dismissed.

LUSH J. I agree. This case seems to me to be fairly plain if any case under these Acts can ever be said to be plain. The

father of the children was a sailor in His Majesty's service, and therefore it appears to me to be clear beyond controversy that during his residence in the Medway Union he never acquired the status of irremovability. He was removable all the time he was there. The question we have to consider is whether the children acquired a status of irremovability in the Medway Union as a consequence of their residence there. That depends not only on the fact of residence, but on whether they resided there in each of the three years preceding the order for their removal in such circumstances as to render them irremovable in each of the three years. In order to answer that question I refer to the Acts of 1846 and 1848, which deal with the question of what creates a status of irremovability. With regard to Mr. Davey's argument based on s. 3 of the Act of 1846, I would point out that in the opening words of s. 1 of that Act the expression "shall be removed" is used as synonymous with removability. The effect of the proviso to s. 1 of the Act of 1846 when read with the proviso to s. 1 of the amending Act of 1848 is that whenever a child has no other settlement than that of its father the child shall be removable when he is removable and irremovable when he is irremovable. It seems to me to follow necessarily from that provision that inasmuch as the father of these children was removable from the Medway Union, because being a sailor he had been unable to acquire a status of irremovability in that union, the children also during the whole period of their residence there were removable. Therefore they did not reside in that union in such circumstances as to be irremovable in each of the years of their residence. It follows that they did not obtain a settlement in the Medway Union under the Act of 1876. In my opinion the order of removal was right, and this appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Speechly, Mumford & Craig, for M. Nicholson, Doncaster.*

Solicitor for respondents: *E. W. Sampson.*

F. O. R.

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Nov. 17.

PHESSE *v.* FISHER.

Stage Carriage—Tramcar—"Inside"—Upper and Lower Compartment—Both Compartments covered—Conveyance of Passengers in Excess of Number for which Car licensed—Railway Passenger Duty Act, 1842 (*5 & 6 Vict. c.* 79), *ss.* 14, 15—*London County Council (Tramways and Improvements) Act*, 1913 (*3 & 4 Geo. 5, c. cii.*), *s.* 27.

By s. 15 of the Railway Passenger Duty Act, 1842, if the number of passengers conveyed in any stage carriage is greater in the inside or outside than it is constructed to carry the conductor shall be liable to a penalty.

By s. 27 of the London County Council (Tramways and Improvements) Act, 1913 (3 & 4 Geo. 5, c. cii.), permission was given to carry inside a tramcar an excess of one-third of the number of inside passengers for which the car was licensed on (inter alia) special occasions.

The respondent was summoned under s. 15 of the Railway Passenger Duty Act, 1842, for unlawfully conveying in, upon, or about a tramcar, of which he was conductor, a number of passengers in excess of the number which the car was licensed to carry. The car was licensed to carry thirty passengers in the lower compartment and forty-four in the upper compartment. On the occasion complained of the number of passengers in the upper compartment was forty-eight. Both the upper and the lower compartments were covered in. It was admitted that the day in respect of which the respondent was summoned was a special occasion within the meaning of s. 27 of the Act of 1913. The magistrate held that the word "inside" in that section referred both to the lower and upper compartments of a tramcar and accordingly dismissed the summons:—

Held, that the magistrate was wrong and that the case must be remitted to him with directions to convict. The upper compartment was no doubt part of the inside of the tramcar so far as related to protection from the weather, but reading the Acts of 1842 and 1913 together it was necessary to treat the inside of a tramcar as correlative with the lower compartment, and the outside as correlative with the upper portion. The fact that s. 27 of the Act of 1913 referred to the inside showed that the Legislature still contemplated the existence of an outside.

Case stated by a metropolitan magistrate.

On March 17, 1914, the respondent Fisher, a tramway conductor employed by the London County Council, appeared at the Lambeth Police Court before the magistrate to answer an information laid by the appellant, a police constable, for that the respondent

on February 27, 1914, at Kennington Park Road, within the metropolitan police district, being the conductor of the London County Council metropolitan stage carriage No. 901, did unlawfully convey in, upon, and about the carriage a greater number of passengers in the whole than the carriage was constructed to carry, namely, six in excess of the authorized number, at 9.35 A.M.

The tramcar was constructed to carry passengers in two compartments, the lower and upper one. Both compartments were covered in. The tramcar was constructed to carry in the lower compartment thirty passengers, and in the upper compartment forty-four passengers. In the lower compartment there was painted, in accordance with s. 14 of the Railway Passenger Duty Act, 1842 (1), the words "Constructed to carry 74 passengers; 30 inside and 44 out."

At 9.35 A.M. on February 27, 1914, the number of passengers being conveyed in the upper compartment was forty-eight.

The occasion in respect of which the information was laid against the respondent was a special occasion within the meaning of s. 27 of the London County Council (Tramways and Improvements) Act, 1913. (2)

(1) Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79), s. 14: "No stage carriage shall be used . . . . unless . . . . there shall be . . . . painted . . . . upon some conspicuous part on the outside of such carriage, at the back thereof, and also in the inside thereof, and where the same shall be constructed to carry passengers in different compartments, then in each such compartment . . . . the number of passengers which such carriage is constructed to carry according to this Act in the whole, and on the outside and in the inside thereof respectively, and in each such compartment . . . ."

Sect. 15: "If the number of passengers at any one time conveyed in, upon, or about any stage carriage shall be greater in the whole, or upon or about the outside thereof, or in the inside thereof, or in any compartment thereof respectively, than the same is constructed to carry, according to the regulations of this Act, or than any particulars painted thereon shall specify in the whole, or upon the outside thereof, or in the inside thereof, or in any compartment thereof respectively, the driver and conductor or guard thereof for the time being respectively shall forfeit the sum of five pounds."

(2) London County Council (Tramways and Improvements) Act, 1913 (3 & 4 Geo. 5, c. cii.), s. 27: "Notwithstanding anything to the contrary contained in any Act order byelaw or regulation the council may during inclement weather or on Sundays or Bank or other public

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On the part of the respondent it was contended that he had not committed the offence charged in the information because the passengers were carried inside the tramcar.

On the part of the appellant it was contended that the words "inside any carriage used . . . . on any tramway" in s. 27 of the Act of 1913 referred only to the lower part of the tramcar, and that the upper part of the tramcar would be properly described as the "outside" of the tramcar.

The magistrate held that the word "inside" in s. 27 of the Act of 1913 referred to both the lower and upper compartments of the tramcar and accordingly dismissed the information.

The question for the opinion of the Court was whether the magistrate came to a correct determination in point of law.

Travers Humphreys, for the appellant. The question is whether the word "inside" in s. 27 of the London County Council (Tramways and Improvements) Act, 1913, includes not only the lower compartment but the covered upper compartment. A person sitting in the upper compartment of the tramcar might be said to be inside the compartment. But the word "outside" in s. 27 of the Act of 1913 has the same meaning as the word "outside" in the Railway Passenger Duty Act, 1842, i.e., the top of the tramcar, and the word "inside" is therefore confined to the lower compartment. The mere fact that since 1842 tramcars have been made more comfortable by being covered in does not make any difference in the construction of the Act of 1842. It is clear that the Act of 1913 must be read together with the Act of 1842 and as referring to it. The word "inside" is used in opposition to "outside," and it follows that there is an "outside," i.e., the top. If that is not the meaning of the word "outside" it would follow that an indefinite number of passengers might be crowded into the top compartment. If

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holidays throughout the day or on Saturdays after 12 o'clock noon or (with the consent of the Commissioner of Police of the Metropolis) on special occasions carry inside any carriage used by them on any tramway an additional number of passengers not exceeding one third of the number of inside passengers which such carriage is licensed to contain."

there is not an "inside" as distinguished from the outside the Legislature would have enacted that on special occasions extra passengers might be carried in the "tramcar," not in the "inside" of the tramcar.

Martin O'Connor and *C. T. Williams*, for the respondent. At the time the Railway Passenger Duty Act, 1842, was passed there was no such thing as a double-decked tramcar. At the present time an entirely different kind of vehicle is placed upon the roads, and s. 27 of the London County Council (Tramways and Improvements) Act, 1913, was passed with a view to the convenience of the public during inclement weather. The ordinary meaning of the words "inside" and "outside" has no application to a covered tramcar. To say that the "outside" means the covered upper deck would be to give a distorted meaning to the word "outside." In the Act of 1842 the "outside" of the tramcar meant the portion exposed to the weather. If a tramcar had three decks the upper and middle decks could not be properly said to be the "outside." At the present day not all tramcars are covered over, and the Act of 1913 has reference to those tramcars which are uncovered.

RIDLEY J. Mr. O'Connor has argued this case very well on behalf of the respondent. I think the learned magistrate probably paid too much attention to the meaning of the words "inside" and "outside" in their physical sense and thought that because the compartment of the tramcar was covered it must be treated as the inside. In my judgment that is correct so far as the condition of weather and other similar incidents are concerned. The passenger has the same protection with regard to those incidents which he obtains inside, whether he is sitting in the lower compartment or in the upper one; but it seems to me that in the Railway Passenger Duty Act, 1842, and the London County Council (Tramways and Improvements) Act, 1913, it is necessary to treat "inside" as correlative with the lower compartment—the body of the vehicle—and "outside" as correlative with the top part. Otherwise, s. 27 of the Act of 1913 becomes unworkable. The tramcar was constructed to carry, according to the notice put up under the provisions of the

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Railway Passenger Duty Act, 1842, thirty passengers in the lower compartment and forty-four in the upper. On the particular occasion there were forty-eight in the upper compartment, which was four more than the number allowed. It was contended that no offence had been committed because, under the provisions of s. 27 of the Act of 1913, one-third more than the ordinary number are allowed to be carried inside on particular occasions. If we were to hold, in accordance with the view suggested by the learned magistrate, that having regard to the way the carriage is constructed the "inside" includes the whole of it, there would be power to carry in the top compartment as many as seventy-four plus one-third, making nearly one hundred passengers in the top compartment. It is quite unnecessary to place that meaning on the word "inside," because the Court can, by reference to the Railway Passenger Duty Act, 1842, hold that there are two parts of the vehicle which are practically dealt with, one the top and the other the lower compartment. That is the scheme of the legislation which is adhered to in the London County Council (Tramways and Improvements) Act, 1913. It is not possible, on a close examination of the matter, to read it otherwise. The phraseology of s. 27 of the Act of 1913 must mean that there is an outside of the carriage because, whilst it gives liberty to carry an extra number inside, it obviously excludes the right to carry extra numbers outside.

For these reasons I think that the decision of the learned magistrate was wrong.

AVORY J. I am of the same opinion. I think the learned magistrate in this case was misled into reading the word "inside" in s. 27 of the London County Council (Tramways and Improvements) Act, 1913, too strictly in its etymological sense, without regard to the meaning which it becomes obvious the word is intended to have when s. 27 of the Act of 1913 is compared with the Railway Passenger Duty Act, 1842. It appears to me that s. 27 of the Act of 1913 can only apply to a hackney carriage or tramway car which has both an inside and an outside. If it applies to this tramcar, then it is lear that the top deck, as it is sometimes called, of the tramcar is the outside. If this tramcar

has no outside, then s. 27 of the Act of 1913 has no application to that particular tramcar; and if s. 27 has no application to it, then the person charged with the offence has nothing on which he can rely to excuse him from the penalty imposed by the Act of 1842.

For these reasons I think that the learned magistrate was wrong and that the appeal must be allowed.

LUSH J. I agree that this appeal ought to be allowed, but I am not at all clear, speaking for myself, whether, if a tramcar is constructed without any outside, that is to say without any seats on the roof, s. 27 would not still apply, so that, in the events provided for by s. 27, the additional number of passengers might be conveyed inside the tramcar.

RIDLEY J. I wish to add that I do not disagree with my brother Lush about that; if there were no outside to the tramcar a passenger would be riding inside the carriage because there is no other place except the inside.

Case remitted to magistrate to convict.

Solicitors for appellant: *Wontner & Sons.*
Solicitor for respondent: *C. F. Appleton.*

J. E. A.

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Nov. 26.

HILL, Appellant *v.* BECKETT, Respondent.

National Insurance — Contribution — Employed Contributor — Contract of Service—Sub-contractor—National Insurance Act, 1911 (1 *& 2 Geo. 5, c. 55*), *s.* 1.

The respondent, who was a coal dealer, for the purpose of carrying out the loading and unloading of coal at his yard employed a person described as a "yard foreman," and paid him weekly at a fixed rate per ton of coal handled. Further assistance being required in the yard, the foreman, on the instructions of the respondent, engaged some other men. Each week the foreman received from the respondent the total amount due at the fixed rate per ton, and he divided it in equal shares between himself and the other men employed. If the foreman desired to stay away he obtained permission from the respondent, and one of the other men received the money and shared it with the others. The respondent had the supervision of the work of loading and unloading and generally the right to exercise control over the men in the performance of their duties. Complaints as to the work were in practice addressed to the foreman, who engaged and dismissed the men. The respondent had the right to require the foreman to dismiss a particular man if his work was unsatisfactory:—

Held, that the men were employed by the respondent within the meaning of the National Insurance Act, 1911, and not by the foreman.

Case stated by justices of the peace in and for the county of Middlesex.

An information was preferred by James Rowland Hill (hereinafter called the appellant), an inspector under the National Insurance Act, 1911, against Henry James Beckett (hereinafter called the respondent) for that he, the respondent, on May 9, 1914, at Willesden Green did fail to pay a contribution in respect of the week commencing on May 4, 1914, which he was liable to pay under Part I. of the National Insurance Act, 1911, in respect of an employed contributor, to wit, John Dennis Young, contrary to Part I. of the Act and the Regulations made thereunder.

Upon the hearing of the information the following facts were proved:—

The respondent was one of three partners in the firm of Beckett & Co., coal dealers, who had a coal yard at, among other places, Willesden Green.

For the purpose of carrying out the loading and unloading of

coal at the yard the firm employed a person who was described as "yard foreman" or "loader." The latter was paid by the firm weekly at a fixed rate per ton of coal handled. His personal earnings amounted to something less than 27*s.* a week, and his insurance card was stamped by the respondent on behalf of the firm.

The work at the yard could not be carried out by one man alone, and in consequence of being instructed by the firm to obtain assistance, the then yard foreman, one Harry Fletcher, engaged, amongst others, in or about 1906, a labourer, one John Dennis Young.

Fletcher and Young remained so employed until August, 1913, when both left. After a few days Young was re-engaged by the new yard foreman, one James Arnold, and remained so employed until May 11, 1914.

Each week the yard foreman received from the firm the total amount due at the fixed rate per ton for all coal handled at the yard. He then divided it between himself, Young, and the other men employed, all taking equal shares. If the yard foreman desired to stay away he obtained permission from the firm, and in his absence one of the other men received the total amount and shared it equally with those who had done the work.

The respondent had the supervision of the work of loading and unloading on behalf of the firm and the duty of seeing that the men got through the work in sufficient time, and generally had the right to exercise control over Young in the performance of his duties. Complaints as to the work were in practice addressed to the yard foreman, who dismissed and engaged the men. The firm had the right to require the yard foreman to dismiss a particular man if his work was unsatisfactory.

No insurance contributions in respect of Young were ever paid by the respondent or any other person.

On the part of the appellant it was contended that Young was a person employed by the firm of Beckett & Co. within the meaning of the National Insurance Act, 1911.

On the part of the respondent it was contended that Young was not employed for the week in question by the firm of Beckett & Co.; that the loaders were independent contractors,

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and there was no relation of master and servant between the respondent and the loaders' men.

The justices, by a majority, were of opinion that Young was not a person employed by the firm of Beckett & Co. within the meaning of the National Insurance Act, 1911, and they accordingly dismissed the information.

The question for the opinion of the Court was whether the justices, upon the above statement of facts, came to a correct determination and decision in point of law, and, if not, what should be done.

Harold Murphy, for the appellant. On the facts found by the justices, they were wrong in holding as a matter of law that the man Young was not a person employed by the respondent within the meaning of the National Insurance Act, 1911. The foreman was not the employer of the men, but merely the agent of the respondent to engage them; the question who engages the men is immaterial: *Oldfield* v. *Furniss, Withy & Co.* (1) The test is, does the person alleged to be the employer exercise control over the men: *Ruth* v. *Surrey Commercial Dock Co.* (2); *Marrow* v. *Flimby and Broughton Moor Coal and Fire Brick Co.* (3); *Rourke* v. *White Moss Colliery Co.* (4) *Newell* v. *King* (5) is distinguishable, for there the justices had found as a fact that the workers in question were not under the general control of the respondents. In the present case the justices have found as a fact that the respondent had the right to exercise control over the man in the performance of his duties, and, therefore, on the authorities he is the employer of the man for the purposes of the National Insurance Act, 1911. [*Higginson* v. *Blackwell Colliery Co.* (6) and *Richards* v. *Wrexham and Acton Collieries* (7) were also referred to.]

The respondent did not appear.

RIDLEY J. In this case Mr. Murphy has put the point very well. I do not think it is absolutely clear. In these cases there

(1) (1893) 58 J. P. 102.
(2) (1891) 8 Times L. R. 116.
(3) [1898] 2 Q. B. 588.
(4) (1877) 2 C. P. D. 205.
(5) (1913) 30 Times L. R. 34.
(6) (1913) 30 Times L. R. 175.
(7) [1914] 2 K. B. 497.

may easily be some difference of opinion as to whether or not there is an employment to which the Act applies, because the terms upon which people are employed differ so widely. The magistrates in this case by a majority came to the conclusion as a matter of law that they must dismiss the information on the ground that Young was not a person employed by the respondent's firm. [The learned judge stated the facts, and continued:] In these circumstances the question is whether the foreman was in the position of an independent contractor and was the person who employed Young, or whether Young was employed by the firm who merely employed the foreman so that he also was their servant. I have come to the conclusion on the facts found by the justices that Young was employed by the respondent's firm within the meaning of the Act. To constitute a man an independent contractor it is not sufficient in these cases to show merely that he pays the wages of the men working under him or that he has the power to engage and dismiss them. There must be something in the nature of an employment of them by him to do a particular job or to carry out a particular work. By way of illustration I refer to *Marrow* v. *Flimby and Broughton Moor Coal and Fire Brick Co.* (1) That was a case under the Employers' Liability Act, by which the expression "workman" is defined to include any person, being a labourer, who "works under a contract with an employer." A man had entered into a contract with the owners of a colliery to sink a shaft in their mine; he was to provide the sinkers necessary for the work and was to pay them. One of the men engaged by him for the work was injured, and sued the colliery owners, but it was held that the workman had not entered into a contract with the colliery owners as his employers, and that the man who undertook the work was an independent contractor.

That case bears out what I said as to an independent contractor being a person who has a particular job entrusted to him. The foreman in this case had no such employment as that. He was simply a person who carried out certain work under the supervision of his employers. There was no contract between him and the firm under which he was to see that the

(1) [1898] 2 Q. B. 588.

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work was properly done, and to engage and pay the men and be responsible for their proper conduct. It is true that the wages of the men passed through his hands, but the firm retained control both over him and over the men in the performance of their duties. The case I have quoted is a useful illustration showing where the line is to be drawn. *Oldfield* v. *Furniss, Withy & Co.* (1), which is an example of a case on the other side of the line, also seems to me to be in point. Having regard to the objects and provisions of the National Insurance Act I think that it was intended that the Act should receive a wide interpretation as regards the persons whom it was intended to benefit. Sect. 1 only uses the words "who are employed," but a reference to the First Schedule to the Act shows that the term "employment" is used in the Act in a very wide sense.

I have come to the conclusion that the decision of the justices was wrong and that this appeal must be allowed.

AVORY J. I am of the same opinion. I think that Young was employed by the respondent under an implied contract of service within the meaning of Part I. of the National Insurance Act. The justices have found as facts that the respondent had the supervision of the work on behalf of the firm and generally had the right to exercise control over Young in the performance of his duties, and that, although the foreman engaged and dismissed the men, the firm had the right to dismiss a particular man if his work was unsatisfactory. I think those facts conclusively show that the relationship of master and servant existed between the respondent and Young. There is no better working rule for determining the question than that laid down many years ago by Blackburn J. in *Reg.* v. *Negus* (2), where he said that the test is whether the alleged servant is under the control and bound to obey the orders of the alleged master; if he is, then the relationship of master and servant exists. The findings of fact to which I have referred appear to me clearly to establish that relationship, and I think, therefore, that the magistrates misdirected themselves on a question of law in holding that Young was not employed by the respondent.

(1) 58 J. P. 102.

(2) (1873) L. R. 2 C. C. R. 34, at p. 37.

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LUSH J. I am of the same opinion. If the justices had found as a fact, apart from the Act, that Young was not employed by the firm and had asked this Court the question whether upon the facts stated in the case they were justified in coming to that conclusion, I should have had very great doubt as to whether we ought not to have said that they were not justified in so finding. But I do not think that they have found that as a fact. The last paragraph in the case states that the justices by a majority were of opinion that Young was not a person employed by the firm "within the meaning of the National Insurance Act, 1911." I think that means that the majority of the justices were of opinion as a matter of law upon the facts stated in the earlier part of the case that they were bound to come to the conclusion that there was no contract of employment of Young by the firm within the meaning of the Act. I think that that is wrong. When one finds that the foreman could go away if he got leave, and that the firm then gave the money to one of the men to distribute between himself and the others, and when one considers that the firm exercised control over the men and could give them orders, the proper inference in my opinion is that Young was employed by the firm so that they come within s. 1 of the Act.

Appeal allowed.

Solicitor for appellant: *Solicitor to the Insurance Commissioners.*

F. O. R.

C. A.
1914
Nov. 5, 6.

[IN THE COURT OF APPEAL.]

NORMAN *v.* GREAT WESTERN RAILWAY COMPANY.

Negligence—Railway Company—Duty towards Persons coming on Premises—Invitees—Station Yard—Open Culvert—Horse and Cart unattended.

The duty of a railway company towards persons resorting to their stations and yards in the ordinary course of business is not higher than that of the occupier of private premises towards invitees resorting to such premises in the ordinary course of business as laid down in *Indermaur* v. *Dames* (1866) L. R. 1 C. P. 274; (1867) L. R. 2 C. P. 311. The duty of the railway company in such a case may be stated to be a duty to take reasonable care that their premises are reasonably safe for persons using them in the ordinary and customary manner and with reasonable care.

A railway company occupied a station yard with an approach thereto. The plaintiff was in the habit of going himself or sending his driver to the station yard with a horse and cart to receive or deliver goods. The yard was bounded on part of one side by a sloping bank, unfenced, at the bottom of which was an open culvert. Both the plaintiff and his driver knew the place well. On the occasion in question the driver drove the horse and cart to the yard, and loaded some sacks of flour, which were consigned to the plaintiff, on to the cart from a railway truck on a siding at one side of the yard. He then drove the horse and cart up to the door of the weighing office. The sloping bank was about forty feet behind the cart. He left the horse and cart unattended, as he and other drivers usually did when they went in to sign for goods, and went into the office, where he remained for a few minutes. The horse in his absence backed the cart over the bank, and was dragged backwards into the culvert and injured.

In an action in the county court against the company for negligence in not fencing the bank, the jury found a verdict for the plaintiff. The county court judge entered judgment in accordance with the verdict:—

Held, that there was no evidence of any breach of duty on the part of the defendants causing the accident, and that they were therefore entitled to judgment.

Judgment of the Divisional Court [1914] 2 K. B. 153 reversed.

Appeal from the decision of a Divisional Court (Bray and Lush JJ.) affirming the judgment of the Pontypridd County Court; reported [1914] 2 K. B. 153.

The defendants had a station with a station yard or approach thereto at Penygraig. The plaintiff was in the habit of going himself or sending his driver, named Bridges, with a horse and

cart to the station yard to receive goods consigned to him or to deliver goods for carriage. The yard was entered by a gateway, and in the yard on the right of the person entering there was a wall bounding one side of the yard. About sixty feet on there was a weigh office which backed on to the wall, and in front of it there was a weighing machine. The wall did not extend beyond the weigh office. Beyond the weigh office there was a bank sloping down from the yard and extending for a considerable distance along that side of the yard, and at about ten feet from the weigh office the bank ended in an open culvert, which extended along the bottom of the bank for about fifty feet. The bottom of the culvert was seven feet below the surface of the yard. On the opposite side of the yard there were lines of railway and sidings open to the yard. The width of the roadway from the top of the bank over the culvert to the railway lines was thirty-seven feet. Opposite to the weigh office and on the side of the yard next the rails there was a signal box, the distance between the signal box and the weigh office being twenty-five feet, and between the signal box and the weighing machine 13½ feet.

Both the plaintiff and Bridges knew the place well. On the occasion in question Bridges went with the plaintiff's horse and cart to the station yard to get some sacks of flour which had been consigned to the plaintiff. Having loaded the sacks on to the cart from a railway truck, he drove the horse and cart back to the weighing office, and stopped in that part of the roadway which lay between the weighing machine and the signal box. He left the horse and cart unattended, with the reins slung over the lamp bracket at the side of the cart, the horse's head being towards the gateway, and he went into the office. There he remained according to his own account for two or three minutes, according to the evidence of the defendants for seven or eight minutes. There was some dispute as to whether he did or did not sign the book: he said he did. When he was about to leave the office he looked out of the window (which extended along the whole front of the office facing the weighing machine) to see to his horse and cart, and he found them gone. Another man in the office heard a noise; they both came out, and found that what had happened was this: the horse being left alone had backed

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the cart from some unexplained cause until the wheels of the cart got over the bank, and the horse was then dragged backwards with the cart into the culvert. The distance from the place where the horse and cart were left to the place where they were found was about forty feet. The horse was very much hurt and had to be destroyed. There was evidence that carters usually left their horses unattended outside the weigh office when they went in to sign the book, and that there had never been an accident of the kind before. The action was brought for damages for the loss of the horse, the cause of action being the alleged negligence of the defendants in not fencing the bank at the side of the yard.

The action was tried with a jury. At the close of the plaintiff's case, counsel for the defendants submitted that there was no case to go to the jury. The county court judge left the case to the jury, reserving all rights of argument and discussion. The jury found a verdict for the plaintiff for 37*l*. Thereupon after argument the county court judge considered his judgment and, with some doubt, ultimately gave judgment in accordance with the verdict, although, as he said, it was not a decision which he would have come to himself.

In the Divisional Court both the learned judges held that the duty of a railway company towards persons resorting to their stations and yards in the ordinary course of business was higher than that of the occupier of private premises towards persons resorting thereto on invitation in the ordinary course of business; and that railway companies were bound to take reasonable care to have their premises reasonably safe for persons using them in the ordinary and customary manner and with reasonable care. Bray J. held that there was evidence of a breach of that duty causing the accident, whereas Lush J. held that there was not. In the result, therefore, the judgment of the county court judge was affirmed. (1)

The defendants by leave appealed.

Schiller, K.C., and *W. H. P. Lewis*, for the defendants. The duty of a railway company is not higher than that which a person

(1) [1914] 2 K. B. 153.

who occupies premises and invites others to come on to those premises to do business there owes to the persons so coming on to the premises. That duty is laid down in *Indermaur* v. *Dames*. (1) Willes J. in delivering the judgment of the Court of Common Pleas said (2): "The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied. And, with respect to such a visitor at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know." This statement of the law was affirmed by the Exchequer Chamber. (3) In Lord Halsbury's Laws of England, vol. xxi., s. 656, the proposition is stated thus: "The duty of the occupier of premises on which the invitee comes is to take reasonable care to prevent injury to the latter from unusual dangers which are more or less hidden, of whose existence the occupier is aware or ought to be aware, or, in other words, to have his premises reasonably safe for the use that is to be made of them." In *Lowery* v. *Walker* (4) Vaughan Williams L.J. said that "that duty does not, according to the authorities, amount to a guarantee by the invitor that the person invited shall suffer no injury while on the premises to which he has been invited to come, but only to a duty to take reasonable care that he shall not be exposed to dangers which are more or less hidden, and not obvious. Cases of that kind have been frequently called 'trap' cases." This passage is not affected by the reversal of the decision in the House of Lords. (5) In *Latham* v. *R. Johnson & Nephew* (6) Hamilton L.J. said, as regards the duty which the owner or occupier of premises owes to a person who comes on the premises, that "the law has long recognized three categories of obligation.

(1) L. R. 1 C. P. 274; L. R. 2 C. P. 311.
(2) L. R. 1 C. P. at p. 288.
(3) L. R. 2 C. P. 311.
(4) [1910] 1 K. B. 173, at p. 183.
(5) [1911] A. C. 10.
(6) [1913] 1 K. B. 398, at p. 410.

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In these the duty of the owner or occupier to use care, if it exists at all, is graduated distinctly, though never very definitely measured . . . . The lowest is the duty towards a trespasser. More care, though not much, is owed to a licensee—more again to an invitee." The Lord Justice does not state that there is any fourth class such as the plaintiff here suggests. If the railway company owe a higher duty than an invitor, it can only be a warranty that the premises are safe even for horses which may back.

That being the nature of the duty, there was no evidence of the neglect of any such duty on the part of the defendants causing the accident. *Cornman* v. *Eastern Counties Ry. Co.* (1) is strongly in the defendants' favour. In *Longmore* v. *Great Western Ry. Co.* (2) the bridge by which the passengers crossed the line was peculiarly dangerous to passengers, owing to insufficient protection, and the defendants were held liable. That case was distinguished upon that ground in *Crafter* v. *Metropolitan Ry. Co.* (3) In *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Woodcock* (4) the facts were very similar to those in the present case, and the railway company were held not liable. Blackburn J. there applied the principle of invitation as laid down by Willes J. in *Indermaur* v. *Dames* (5) to the railway company in that case. In *Simkin* v. *London and North Western Ry. Co.* (6) the plaintiff was injured when leaving the railway station in a carriage by reason of the horse being frightened by an engine on the line which ran close to the road forming the approach to the station. It was held that the railway company were not bound to screen the railway from the road. The defendants therefore in the present case were not under a duty to fence the bank, and, even if they were, there was no evidence that the absence of a fence was the cause of the accident. The accident was caused by the horse being left unattended.

Sanderson, K.C., and *Harold Morris*, for the plaintiff. The question whether the plaintiff was guilty of contributory negligence

(1) (1859) 4 H. & N. 781.
(2) (1865) 19 C. B. (N.S.) 183.
(3) (1866) L. R. 1 C. P. 300.
(4) (1871) 25 L. T. 335.
(5) L. R. 1 C. P. at p. 288.
(6) (1888) 21 Q. B. D. 453.

was left to the jury with a proper direction, and they must be taken to have found that the plaintiff's driver was not guilty of contributory negligence. This Court cannot disturb that finding. The only question is whether there was any evidence of negligence on the part of the defendants. The duty of the defendants is properly laid down by Bray J. in the Court below (1): "It was at least a duty to take reasonable care that their premises were reasonably safe for persons using them in the ordinary and customary manner and with reasonable care. I am inclined to think that there was no warranty that the premises were reasonably safe, but that the defendants were only under an obligation to take reasonable care that they should be so, but it is not necessary to decide this question because, if by reason of the slope being unfenced the premises were not reasonably safe, the defendants had done nothing to make them safe and had entirely neglected to fence them."

In *Simkin* v. *London and North Western Ry. Co.* (2) Lopes L.J., in delivering the judgment of Cotton L.J. and himself, said: "The duty which the defendants owed the plaintiffs was to provide a reasonably safe mode of leaving their station, having regard to the business they carried on at their station." Fry L.J. in the same case said (3): "The railway company were under an obligation to provide means of access to and egress from their station reasonably safe and suited for the carrying on of the business which their Act of Parliament authorized them to carry on." That is the duty imposed upon a railway company towards persons resorting to their premises on business. A railway company carry on a public undertaking under a monopoly conferred by the Legislature, and all persons have a right to resort to the company's premises on business. They owe therefore a higher or stricter duty towards those persons than an ordinary occupier of premises owes to those whom he invites to come upon his premises on business. The duty is to take reasonable care that the premises are safe, for those who resort thereto on business, against danger, whether usual or unusual, which is known or ought to be known to the company.

(1) [1914] 2 K. B. at p. 163. (2) 21 Q. B. D. at p. 457.
(3) Ibid. at p. 459.

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In *Lancaster Canal Co.* v. *Parnaby* (1) Tindal C.J., in delivering the judgment of the Exchequer Chamber, said that the common law imposed a duty on the proprietors of the canal, not perhaps to repair the canal or absolutely to free it from obstruction, but "to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property." In *Longmore* v. *Great Western Ry. Co.* (2) Erle C.J. said that "the question seems to me to have been one peculiarly for the jury, viz., whether the defendants exercised reasonable care and skill in the construction of this bridge which passengers going by their railway were invited to use." In that case the bridge, like the bank here, was not properly protected, and in consequence the plaintiff, who had previously crossed the bridge many times, was injured, and the railway company were held liable. The duty is laid down in similar terms in *Grote* v. *Chester and Holyhead Ry. Co.* (3), as explained in *Francis* v. *Cockrell* (4); *Thompson* v. *North Eastern Ry. Co.* (5); *Lax* v. *Corporation of Darlington* (6); *Thomas* v. *Quartermaine.* (7) In Addison on Torts, 8th ed., p. 717, the law is stated in a passage which was quoted with approval by Lush J. (8): "The duty is at its highest in the case of one who exercises a public calling and invites persons to use his property for purposes of his calling. The grant or licence under which he carries on his business is given partly for the benefit of the public, and it is his duty to keep the property in a reasonably safe condition." That is the duty on a railway company, and it is higher than the duty imposed upon an ordinary occupier of premises towards a person invited by him to come there on business; but whether or not the duty is higher is not material, so long as that is recognized as the duty. It is a question for the jury in each case whether the premises are reasonably safe for persons going there on business; in other words, whether there was negligence on the part of the defendants

(1) (1839) 11 Ad. & E. 223, at p. 243.
(2) 19 C. B. (N.S.) at p. 188.
(3) (1848) 2 Ex. 251.
(4) (1870) L. R. 5 Q. B. 501, at p. 505.
(5) (1860) 2 B. & S. 106; in Ex. Ch. (1862) 2 B. & S. 119.
(6) (1879) 5 Ex. D. 28.
(7) (1887) 18 Q. B. D. 685, at pp. 696, 697.
(8) [1914] 2 K. B. at p. 160.

causing the accident; and the question of contributory negligence is always for the jury to decide and it lies on the defendants to prove it: *Dublin, Wicklow and Wexford Ry. Co.* v. *Slattery* (1); *Davey* v. *London and South Western Ry. Co.* (2); *Wakelin* v. *London and South Western Ry. Co.* (3) There is no question here of the application of the doctrine of volenti non fit injuria. No such point was taken in the county court. The jury negatived contributory negligence, and there was evidence upon which the jury could find that the station yard was not a reasonably safe place for persons resorting thereto on business with horses and carts by reason of the bank not being fenced. Lush J. was therefore wrong in saying that he was entitled to hold that the plaintiff's driver was guilty of contributory negligence. (4) The judgment of Bray J. was right and should be affirmed. [*Wharton* v. *Lancashire and Yorkshire Ry. Co.* (5) was also referred to.]

No reply was called for.

BUCKLEY L.J. In my opinion this appeal succeeds. [His Lordship stated the facts and continued:] The liability of a person upon whose land another comes towards the latter in respect of not exposing him to danger may be stated in an ascending scale. The liability is lowest towards a trespasser. If a trespasser chooses to come upon another person's land, in which the latter has dug a hole and covered it with brushwood for the purpose of catching an animal, or for some such purpose, the trespasser, if he falls into the hole, cannot complain. He had no right to be there, and if he is injured he must bear the consequences. The next is the case of a licensee. He is allowed to come on the premises and he must take them as they are, but the occupier must not expose him to a hidden peril. If the occupier knows of a danger upon the premises he must warn the licensee; he owes a duty to the licensee not to lay a trap for him. Next in the ascending scale is the invitee. The illustration commonly given is that of a shopkeeper who tacitly invites

(1) (1878) 3 App. Cas. 1155, at pp. 1169, 1175, 1176, 1180.
(2) (1883) 12 Q. B. D. 70, at p. 78.
(3) (1886) 12 App. Cas. 41, at pp. 47, 48.
(4) [1914] 2 K. B. at p. 162.
(5) (1888) 5 Times L. R. 142.

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persons to come into his shop and do business with him. The duty of the invitor towards the invitee is stated by Willes J. in *Indermaur* v. *Dames* (1) in language which was affirmed in the Exchequer Chamber (2) and which has been repeatedly cited in subsequent cases as being a correct statement of the law. The statement is this: "And, with respect to such a visitor at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact." The duty of the invitor towards the invitee is to use reasonable care to prevent damage from unusual danger which he knows or ought to know. If the danger is not such that he ought to know of it, his liability does not extend to it.

It is suggested that there is a fourth class in this ascending scale, namely, the owner of premises who is bound to admit persons to his premises and therefore cannot be correctly described as an invitor. It is said that he owes a still higher duty. A railway company is a person to whose stations a member of the public is entitled to have access if he wants to travel by or make use of the railway. He is entitled to walk into a station and ask for a ticket for the purpose of travelling on the railway, or, if he is a person who is consigning or receiving goods, he is entitled to enter the station for the purpose of sending or receiving his goods. In such cases there is not, properly speaking, any invitation. The passenger or owner of the goods comes there as of right. Is the duty towards the person who so comes upon the premises higher than that which is owed to an invitee properly so called? In my opinion it is not. There is nothing either in principle or authority to show that, when a person comes reasonably and properly upon the premises of another as of right, as distinguished from by invitation, there is any higher obligation on the person on whose premises he

(1) L. R. 1 C. P. 274, at p. 288. (2) L. R. 2 C. P. 311.

comes than exists in the case of a person who invites another on to his premises. There is no authority against this view, and I think that there is authority in support of it. In *Lancaster Canal Co.* v. *Parnaby* (1), which was the case of a canal company, Tindal C.J., in delivering the judgment of the Exchequer Chamber, said (2): "The common law, in such a case, imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property. We concur with the Court of Queen's Bench in thinking that a duty of this nature is imposed upon the company, and that they are responsible for the breach of it upon a similar principle to that which makes a shopkeeper, who invites the public to his shop, liable for neglect on leaving a trap door open without any protection, by which his customers suffer injury." In the present case the railway company are persons upon whose premises the plaintiff, by his carter, was entitled to come as of right. The railway company in the circumstances owed to him the duty stated in *Indermaur* v. *Dames* (3), but no higher duty.

I cannot help thinking that the learned judges in the Court below were under some misapprehension as to what *Indermaur* v. *Dames* (3) decided. Both the learned judges said that the railway company owed a higher duty than that owed by an ordinary invitor towards an invitee. The difficulty lies in tracing a duty higher than that. Bray J. said (4) that it was contended "that the duty of the defendants was no more than that of the defendant in *Indermaur* v. *Dames* (3), i.e., that of using reasonable care to prevent damage to the plaintiff from unusual danger or of warning the plaintiff of the unusual danger, and that the judge misdirected the jury in not directing them that that was the only duty . . . . In my opinion both on reason and on authority the duty of the defendants was larger"—He must, I think, mean larger than that in *Indermaur* v. *Dames* (3), and, if so, I think he was

(1) 11 Ad. & E. 223.
(2) Ibid. at p. 243.
(3) L. R. 1 C. P. 274; L. R. 2 C. P. 311.
(4) [1914] 2 K. B. at p. 163.

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wrong—"it was at least a duty to take reasonable care that their premises were reasonably safe for persons using them in the ordinary and customary manner and with reasonable care." That statement of the duty is, I think, correct, and it is not a larger duty than that in *Indermaur* v. *Dames*. (1) In my view there is no larger duty upon the railway company because they are persons upon whose premises the plaintiff was entitled to send his horse and cart as of right. If that is so, the duty is left as stated in *Indermaur* v. *Dames* (1), and the question is whether there was any evidence of negligence against the railway company. They have a station yard with a roadway thirty-seven feet wide. Upon one side of that yard there is a declivity. It is not in the least necessary for any one using the yard to approach the declivity. The company did not put a fence along it. I am asked to infer that the accident resulted because there was no fence there. If I had to investigate all the facts and decide upon them—which I have not—I should have said that the cause of the accident was, not that the bank was unfenced, but that the driver did not attend to his horse, and that the horse for some unexplained reason backed the cart on to the slope. It is sufficient, however, for me to say that there is nothing to show that the non-existence of a fence was the cause of the injury; and further, I do not see any evidence to show a duty to fence the place. There was therefore no evidence to go to the jury, and judgment must be entered for the defendants. The appeal will be allowed.

PHILLIMORE L.J. I am of the same opinion. I agree with the Lord Justice that the duty on a railway company is not higher than that on an ordinary tradesman inviting persons to come into his premises. I should like to amplify a little the citation from *Indermaur* v. *Dames* (2) by quoting a passage from the judgment of Kelly C.B. in delivering the judgment of the Exchequer Chamber in the same case. The Chief Baron said (3): "What then is the duty imposed by law on the owner of these premises? They were used for the purpose of a sugar refinery,

(1) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

(2) L. R. 1 C. P. at p. 288.

(3) L. R. 2 C. P. at p. 313.

and it may very likely be true that such premises usually have holes in the floors of the different storeys, and that they are left without any fence or safeguard during the day while the workpeople, who it may well be supposed are acquainted with the dangerous character of the premises, are about; but if a person occupying such premises enters into a contract, in the fulfilment of which workmen must come on the premises who probably do not know what is usual in such places, and are unacquainted with the danger they are likely to incur, is he not bound either to put up some fence or safeguard about the hole, or, if he does not, to give such workmen a reasonable notice that they must take care and avoid the danger? I think the law does impose such an obligation on him." Then he proceeds to quote with approval the passage from the judgment of Willes J. in the Court below which has been cited by the Lord Justice.

The other case which most nearly bears upon this point is *Simkin* v. *London and North Western Ry. Co.* (1) There I observe that the authority which was relied upon by the plaintiff in his attempt to impose liability on the railway company was *Indermaur* v. *Dames*. (2) In that case Lopes L.J., in delivering the judgment of Cotton L.J. and himself, said (3): "The duty which the defendants owed the plaintiffs was to provide a reasonably safe mode of leaving their station, having regard to the business they carried on at their station." It may be suggested that these words leave out unusual danger, and also the element which Kelly C.B. insisted upon of want of knowledge, because the Chief Baron has by implication said that the workmen who worked on the premises every day and knew about them were not entitled to have the hole fenced. I think that the explanation of the passage in the judgment of Lopes L.J. and the reconciliation of the two are to be found in this, that the duty is always a matter of relation. The duty of the defendants in *Simkin's Case* (1) was a duty towards the plaintiff, namely, to provide a reasonably safe mode of leaving their station. The observation of Fry L.J.—that "the railway company were under an obligation to provide

(1) 21 Q. B. D. 453. (2) L. R. 1 C. P. 274; L. R. 2 C. P. 311.
(3) 21 Q. B. D. at p. 457.

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means of access to and egress from their station reasonably safe and suited for the carrying on of the business which their Act of Parliament authorized them to carry on. The question in this case is whether it was reasonably safe" (1)—again is to be read as applying to the case of the individual who was then seeking to recover; was it reasonably safe for him? We have not for this purpose to consider what is the duty to somebody else. I am not certain that a way to avoid misapprehension which might arise from the use of the words "unusual danger"—which means, in my opinion, danger unusual for the particular person—might not be found by substituting the word "unexpected" for "unusual." It is not a question whether the danger is unusual with regard to all the world, but whether it is unusual with regard to the individual complainant. In other words, in analysing the expression "reasonably safe" one must take into account what is called in modern parlance the personal equation; what may not be safe for one person may be safe enough for the persons who frequent particular business premises. For instance, in loading a ship in a dock a gangway consisting of a plank without a handrail may safely be provided, though its narrowness or slope may be such that ordinary persons, not accustomed to ships, might not find it easy to use, because the stevedore and seamen who are to use it can use it safely. The gangway has to be safe for the class of persons who use it on business, and so far as any complainant is concerned it has to be reasonably safe for him. If it is safe for him, it does not matter whether or not it is safe for anybody else. It is for that reason that the element of knowledge comes in. I have dwelt upon this because it seems to me to show that the duty of a railway company is not higher than the duty which *Indermaur* v. *Dames* (2), rightly understood, lays upon every person who carries on a business and invites the general public to enter his business premises.

That being my view of the law, I am to consider what power the judge or the Court has to interpose when a case of this nature is tried, as it generally is, with a jury. I think that Fry L.J. states the principle in *Simkin* v. *London and North Western Ry.*

(1) 21 Q. B. D. at p. 459. (2) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

Co. (1): "If it was left to my judgment, without the influence which is exercised on it by the previous decisions of other judges, I should say that there was evidence which would justify the jury in finding that it was the want of the screen which was the very cause of the accident in the present case. But I cannot shut out from my mind that there has been a long series of decisions in which, under circumstances not unlike the present, judges have exercised great subtilty in narrowing the findings of the jury in similar cases. I do not say that the rights of the jury have been infringed, but that judges have had a tight rein over them." Then he gives a reason, and proceeds: "My mind is out of sympathy with many of these cases, and I believe that if left to myself my decision would not have been that of the great majority of judges who have tried similar cases. But I feel that the view now taken by my two learned brethren, Cotton and Lopes L.JJ., is more in accordance with previous decisions." The principle which Fry L.J. enunciates there is applied by some of the learned Lords who took part in the decision in *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery.* (2) It is the duty of the judge to stop the case if there is no evidence of negligence, or if there is no evidence of negligence which caused or, possibly, materially contributed to the accident. That duty has to be exercised quite as much upon the point whether the negligence caused the accident as upon the point whether there was negligence at all.

It seems to me that here, upon the principles which have been laid down, we have the right and the duty to intervene. I think that there is no evidence proper to be left to the jury of any negligence on the part of the defendants in the construction of this yard. I also think that, if, contrary to my opinion, there was evidence of any such negligence, there was no evidence that the negligence caused the accident. The yard is a large one, and the bank was at a considerable distance from the spot where the horse and cart stood. No doubt serious consequences might ensue from a horse backing the cart on to the bank. A railway yard is not a place that the railway company are bound to fence. They have no duty, for instance, to fence the yard from the rails

(1) 21 Q. B. D. at p. 459. (2) 3 App. Cas. 1155.

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and sidings, and if a horse and cart are left unattended and the horse unexpectedly backs or starts forward it may get the cart in front of a shunting train and damage may ensue; or it may get the cart entangled in the rails in such a way that the cart may be upset. Suppose that the approach to the yard is itself up a steep incline, are the railway company bound to have a gate which will automatically shut behind the cart when it has got into the yard so as to prevent the possibility of the horse and cart backing out down the hill while the driver is in the goods office? Those are illustrations of the length to which the contention of the plaintiff might carry us. I do not say that the present is a case so extreme as that, but in my opinion there was no duty upon the defendants to provide against the rare contingency of a horse and cart being left unattended and of the horse being of such a disposition that, though the driver might ordinarily leave him for a while and find him where he left him on his return, he might suddenly and unexpectedly back into a position of danger.

The appeal must be allowed.

PICKFORD L.J. I am of the same opinion. I do not disagree with what was said by the Divisional Court as to the duty imposed upon a railway company in the passages I am going to read. Lush J. said (1): "I think it is not accurately said that the defendants are free from liability merely because there was no hidden or concealed trap." Bray J. said (2): "It was at least a duty to take reasonable care that their premises were reasonably safe for persons using them in the ordinary and customary manner and with reasonable care." This last passage seems to me to be quite accurate. Where I do differ is in this, that I do not think that that imposes any higher duty on a railway company than exists in the case of any other invitor towards his invitee. I think that a somewhat too narrow view was taken of the case of *Indermaur* v. *Dames* (3), probably arising from the use of the word "unusual" in the well-known passage in Willes J.'s judgment. I agree with the explanation of that word given by Phillimore L.J. I do not think that this duty is

(1) [1914] 2 K. B. at p. 160. (2) Ibid. at p. 163.
(3) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

larger than that imposed upon an ordinary invitor towards his invitee; but it is not material here, because I agree that that is the duty imposed on the railway company.

The next question is whether there was any evidence that the defendants were guilty of a breach of that duty. The case is somewhat near the line, but upon the whole I think that there is no evidence that the defendants failed to take reasonable care that their premises were reasonably safe for persons using them in the ordinary and customary manner and with reasonable care. It is not the ordinary and customary way of using premises that a horse without an attendant should be backing about the yard. It is one of those accidents which may happen during a reasonable use of the premises, but it is not in itself a reasonable use of the premises. There was no evidence given, as I understand, that in the ordinary use of the premises, that is to say, in bringing carts in and out of and about the premises, there was any danger from this unfenced bank. Unfortunately this horse, being left unattended, without any want of care, as I must take it from the verdict of the jury, took upon itself to back the cart for a considerable distance. That, as I have said, is an accident which may happen during the ordinary use of the yard, but it is not in itself the ordinary use of the yard, and I cannot see that there is any obligation upon the defendants to fence and provide against every accident that may happen in the ordinary use of the yard. Therefore, though I think that the case is somewhat near the line, I agree that there was no evidence of negligence to go to the jury.

Appeal allowed.

Solicitors for plaintiff: *Smith, Rundell, & Dods, for Morgan, Bruce & Nicholas, Pontypridd,*

Solicitor for defendants: *L. B. Page.*

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[IN THE COURT OF APPEAL.]

WIFFEN *v.* BAILEY AND ROMFORD URBAN DISTRICT COUNCIL.

[1913 W. 1539.]

Malicious Prosecution—Damage necessary to support Action for—Summary Proceedings to compel Abatement of a Nuisance—Damage to Reputation—Danger of Imprisonment—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 94, 95, 96.

A complaint under s. 95 of the Public Health Act, 1875, against the occupier of a house for non-compliance with a notice stating that a nuisance existed at the house arising from the want of cleansing of certain rooms, and requiring him to abate the same by stripping the paper off the walls and cleansing and distempering the ceilings and walls of the rooms, is not a proceeding necessarily and naturally involving damage to his fair fame or putting him in peril of losing his liberty, sufficient to support an action by him for malicious prosecution in the event of the complaint having been preferred maliciously and without reasonable and probable cause.

Rayson v. *South London Tramways Co.* [1893] 2 Q. B. 304 distinguished.

Judgment of Horridge J. [1914] 2 K. B. 5 reversed.

Appeal from the judgment of Horridge J. on further consideration after the trial of the action with a jury; reported [1914] 2 K. B. 5.

The plaintiff was the occupier of a house at Romford, certain of the rooms in which were in so dirty a condition that on April 1, 1913, his wife wrote to the defendant Bailey, the inspector of nuisances for the Romford urban district, asking him to view the premises, and inviting his assistance to compel the landlord to do the necessary cleansing and repairs. Bailey inspected the premises, and as the result of his inspection served on the plaintiff a notice, dated April 3, under s. 94 of the Public Health Act, 1875, that the want of cleansing of the rooms in question amounted to a nuisance and requiring him within twenty-one days to abate the same, and for that purpose to strip the paper off the walls and cleanse and distemper the ceilings and walls of the rooms. The plaintiff having failed to comply

with the notice, on May 21 the defendant Bailey, acting upon the instructions of the defendant council, preferred a complaint against him before the Romford justices under s. 95 of the said Act to enforce the abatement of the nuisance as required by the notice. At the hearing the justices dismissed the complaint and awarded the plaintiff 5*l.* 5*s.* costs. The plaintiff had in defending himself against the prosecution incurred further costs as between solicitor and client amounting to 5*l.* 15*s.*, or 11*l.* in all. The plaintiff thereupon brought this action for malicious prosecution. At the trial the jury found that the defendants in taking proceedings under s. 95 were actuated by malice (1), and the judge ruled that they had no reasonable and probable cause for so taking them. A verdict was given for 250*l.* damages.

Horridge J. on further consideration held that the complaint was a proceeding involving damage to the plaintiff's fair fame within the first of the three heads of damage stated by Lord Holt C.J. in *Savile* v. *Roberts* (2) as being sufficient to support an action for malicious prosecution, and he accordingly gave judgment for the plaintiff. (3)

The defendants appealed.

Compston, *K.C.*, and *H. Maddocks*, for the defendants. The action is not maintainable. To support such an action the plaintiff must prove one or other of the three kinds of special damage enumerated by Lord Holt C.J. in *Savile* v. *Roberts* (2), namely, (1.) damage to his fame, as if the matter whereof he is accused be scandalous; (2.) damage to his person, whereby he is put in danger of losing his liberty; (3.) damage to his property, whereby he is forced to expend his money in necessary charges to acquit him of the crime of which he is accused. See also Clerk and Lindsell on Torts, 6th ed., pp. 690—692. The first head of damage, within which Horridge J. held that this case came, as giving rise to a cause of action for malicious prosecution had been laid down some years before in *Henley* v. *Burstal.* (4) The

(1) The jury answered specific questions put to them by the learned judge upon the issue of malice, but for the purposes of this report it is not considered necessary to set them out.

(2) (1698) 1 Ld. Raym. 374, at p. 378.

(3) [1914] 2 K. B. 5.

(4) (1669) T. Raym. 180.

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necessity for one or other of these three heads of damage was restated by Bayley J. in *Freeman* v. *Arkell* (1), and by the Court of Appeal in *Quartz Hill Gold Mining Co.* v. *Eyre*. (2) There has been no damage to the plaintiff's fair fame within the first head. In *Byne* v. *Moore* (3) it was held that an indictment charging a person with having committed an assault was not a charge involving scandal. As Bowen L.J. said in *Quartz Hill Gold Mining Co.* v. *Eyre* (4), it is not every indictment, but only indictments involving either scandal to reputation or the possible loss of liberty to the person, that is, all ordinary indictments for ordinary offences, which will found an action for malicious prosecution. In that case Bowen L.J. suggested (5) that an analogy might be found in the law of slander. An action of slander would not lie without proof of special damage against a person for having stated that the plaintiff had neglected to comply with a cleansing order under s. 94 of the Public Health Act, 1875. Words imputing an offence punishable by fine, non-payment of which may result in imprisonment, are not actionable per se: *Ogden* v. *Turner*. (6) Nor are words imputing that the plaintiff has been guilty of a criminal offence, which is punishable by fine only, but which involves a liability to summary arrest, actionable per se: *Hellwig* v. *Mitchell*. (7) In *Rayson* v. *South London Tramways Co.* (8), upon the authority of which Horridge J. decided this case, the offence charged, though only punishable by fine, involved a serious reflection on the plaintiff's character. The charge was that of having attempted to defraud the tramway company by travelling without having paid the fare. That case is clearly distinguishable on that ground. The decisions in *Mellor* v. *Denham* (9) and *Reg.* v. *Whitchurch* (10) were only upon the question whether the order appealed from was made in a "criminal cause or matter" within the meaning of s. 47 of the Judicature Act, 1873, so as to prevent an appeal to the Court of Appeal. Those decisions do not affect the present case, and they

(1) (1823) 3 Dow. & Ry. 669, at p. 674.
(2) (1883) 11 Q. B. D. 674, at pp. 683, 689.
(3) (1813) 5 Taunt. 187.
(4) 11 Q. B. D. at p. 691.
(5) Ibid. at p. 692.
(6) (1704) 6 Mod. 104.
(7) [1910] 1 K. B. 609.
(8) [1893] 2 Q. B. 304.
(9) (1880) 5 Q. B. D. 467.
(10) (1881) 7 Q. B. D. 534.

are explained in *Attorney-General* v. *Bradlaugh* (1) as being decisions that the proceeding before the justices to recover a penalty is a quasi-criminal matter or a matter which is treated as a criminal matter within the jurisdiction of the justices.

With regard to the second head of damage mentioned by Lord Holt in *Savile* v. *Roberts* (2), namely, damage to the person, as where a man is put in danger to lose his liberty, that does not apply here. To bring the case within that head of damage the imprisonment must be the punishment for the offence. The proceedings against the plaintiff did not involve any direct danger of imprisonment. Under s. 96 of the Public Health Act, 1875, the justices might have imposed a penalty as a punishment, and the enforcement of the penalty might, under s. 251 of the Act coupled with the provisions of the Summary Jurisdiction Acts, have been enforced by warrant of distress and in default of distress by imprisonment. The plaintiff might have avoided any danger of imprisonment by paying the penalty. That is not such danger to liberty as to bring the case within this head of damage. The judgment of the learned judge was therefore wrong. [They also contended that there was no evidence of malice in the defendants and no want of reasonable and probable cause; and further that the verdict was against the weight of the evidence, and that the damages were excessive.]

G. W. H. Jones and *A. Crew*, for the plaintiff. There was damage to the plaintiff's fair fame, as the matter whereof he was accused was scandalous, within the first head of damage stated by Lord Holt C.J. in *Savile* v. *Roberts*. (2) The charge against the plaintiff before the justices under ss. 94—96 of the Public Health Act, 1875, was a criminal charge: *Reg.* v. *Whitchurch*. (3) In that case the proceedings were under these same sections of the Public Health Act, 1875, and it was held that the proceedings were criminal. The same reasoning is to be found in *Reg.* v. *Paget* (4) and *Seaman* v. *Burley*. (5) The offence charged was therefore a criminal offence, and it involved an imputation on the plaintiff's fair fame. *Rayson* v. *South London*

(1) (1885) 14 Q. B. D. 667, at pp. 693, 694.
(2) 1 Ld. Raym. at p. 378.
(3) 7 Q. B. D. 534.
(4) (1881) 8 Q. B. D. 151.
(5) [1896] 2 Q. B. 344.

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Tramways Co. (1) is exactly in point. The reasoning of the Court there was that the offence charged was a breach of a statutory obligation and therefore a misdemeanour, and being criminal that an action for malicious prosecution would lie. It is not necessary to show that the charge would, if spoken of the plaintiff, have afforded ground for an action of slander without proof of special damage. The law as to what slanders will give rise to a cause of action without proof of special damage is no test of what will damage a person's fair fame. *Ogden* v. *Turner* (2) and *Hellwig* v. *Mitchell* (3) were actions of slander, and are therefore not applicable to this case. The principle may be found in the law of libel, namely, that written and published words which expose the plaintiff to hatred, contempt, or ridicule are actionable. That test is complied with in the present case. The charge against the plaintiff, as appearing from the notice served on him, was that he was living in a house which on account of its filthy condition was a nuisance within the Public Health Act, 1875, and in which no respectable man would live. The charge was that he had committed a breach of the law, and it involved a most serious reflection on his fair fame. It is not necessary to say that every charge of a criminal offence will support an action for malicious prosecution. In 2 Hawkins P. C., 7th ed., p. 121, in the chapter on conspiracy, it is said that "an action on the case in the nature of such writ doth lie for a false and malicious prosecution for any crime, whether capital or not capital, though it do not proceed to an actual indictment." It is not necessary that the charge must involve an imputation of the plaintiff's fair fame. It is sufficient if it may do so. [*Seldon* v. *Wilde* (4) was also referred to.]

Next, such a charge as this can be made the foundation of an action for malicious prosecution because the plaintiff was put in danger to lose his liberty, and therefore the second head of damage stated by Lord Holt C.J. in *Savile* v. *Roberts* (5) applies. It is not necessary that the plaintiff should have been imprisoned ; it is sufficient if he was in danger of losing his

(1) [1893] 2 Q. B. 304.
(2) 6 Mod. 104.
(3) [1910] 1 K. B. 609.
(4) [1911] 1 K. B. 701.
(5) 1 Ld. Raym. at p. 378.

liberty. The proceedings might have resulted in a penalty being imposed under s. 96 of the Public Health Act, 1875, which penalty would, by s. 251, have been recoverable in manner directed by the Summary Jurisdiction Acts. By ss. 19 and 21 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), and s. 21 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), the penalty would have been recoverable by distress, and in default of distress the person convicted might have been imprisoned. He was therefore in consequence of the charge in danger of losing his liberty.

As to the third head of damage stated by Lord Holt, it is not open in this Court to contend that the extra expense to the plaintiff of defending himself against the charge beyond the five guineas costs allowed to him by the justices constitutes damage sufficient to support the action. [He also contended that there was no reasonable and probable cause for taking the proceedings, that there was evidence of malice, and that the damages were not excessive.]

Compston, K.C., in reply. With regard to the alleged possible danger of the plaintiff losing his liberty, any civil action may result in a committal order under s. 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), if default is made in payment of a judgment debt; or under the old practice a writ of ca. sa. might have issued. The plaintiff's liberty therefore was not in peril, except upon non-payment of a penalty, if one were imposed. As Buckley L.J. said in *Seldon* v. *Wilde* (1), "Imprisonment is no test of whether proceedings are criminal. Imprisonment is a means employed by the Court to enforce its order in purely civil proceedings."

With regard to the question whether the charge involved an imputation on the plaintiff's fair fame, though he was served with the notice under s. 94 of the Act of 1875 as the occupier of the house, it did not follow that the plaintiff was responsible for the alleged condition of the house. Moreover a thing may be a nuisance without involving any imputation on a person's character. For instance, leaving a coal plate in the pavement of the street unfastened is a nuisance, and so also the keeping of

(1) [1911] 1 K. B. at p. 707.

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a pig in an improper place may be a nuisance, but it could not be said that it involved a scandalous imputation.

BUCKLEY L.J. (after stating the facts). The first question which has been argued before us is whether the action is in the circumstances maintainable. An action for malicious prosecution will lie under the circumstances stated by Lord Holt C.J. in *Savile* v. *Roberts*. (1) There are three sorts of damage, any one of which is sufficient to support this action. First, damage to a man's fame, as if the matter whereof he is accused be scandalous. Secondly, damage to his person, as where a man is put in danger to lose his life, limb, or liberty. Thirdly, damage to his property, as where he is forced to expend money in necessary charges to acquit himself of the crime of which he is accused. The action is maintainable if and only if it falls within one or other of those three heads. An action for malicious prosecution may lie where the proceedings are civil and not criminal. But, as was pointed out by Bowen L.J. in *Quartz Hill Gold Mining Co.* v. *Eyre* (2), it is in very few cases that an action for malicious prosecution will lie where the matter is one of civil proceedings. The Lord Justice gave this reason (at p. 689): "It is clear that Holt C.J. considered one of those three heads of damage necessary to support an action for malicious prosecution. To apply this test to any action that can be conceived under our present mode of procedure and under our present law, it seems to me that no mere bringing of an action, although it is brought maliciously and without reasonable or probable cause, will give rise to an action of malicious prosecution. In no action, at all events in none of the ordinary kind, not even in those based upon fraud where there are scandalous allegations in the pleadings, is damage to a man's fair fame the necessary and natural consequence of bringing the action. Incidentally matters connected with the action, such as the publication of the proceedings in the action, may do a man an injury; but the bringing of the action is of itself no injury to him. When the action is tried in public, his fair fame will be cleared, if it deserves to be cleared; if the action is not tried, his fair fame

(1) 1 Ld. Raym. 374, at p. 378. (2) 11 Q. B. D. 674, at pp. 689—691.

cannot be assailed in any way by the bringing of the action." So the exception of civil proceedings, so far as they are excepted, depends, not upon any essential difference between civil and criminal proceedings, but upon the fact that in civil proceedings the poison and the antidote are presented simultaneously. The publicity of the proceedings is accompanied by the refutation of the unfounded charge, if it be unfounded, which was made. If there be no scandal, if there be no danger of loss of life, limb, or liberty, if there be no pecuniary damage, the action will not lie. Sir James Mansfield C.J. in *Byne* v. *Moore* (1) seems to me to have said very much the same: "I feel a difficulty to understand how the plaintiff could recover in the present action, wherein he could recover no damages, because he clearly has not proved that he has sustained any: I can understand the ground upon which an action shall be maintained for an indictment which contains scandal, but this contains none, nor does any danger of imprisonment result from it: this bill was a piece of mere waste paper." So that what I have to ascertain for the purpose of seeing whether the action will lie is this: Is there, within the first head, scandal, damage to fame? or is there, within the second head, danger of imprisonment? or is there, within the third head, damage to property? The last is not in question in this case. There is no pecuniary damage. Though the costs incurred by the plaintiff were probably larger than the 5*l.* 5*s.* which were allowed to him by the justices, it is well established that the difference between solicitor and client costs and party and party costs is not legal damage. Does the case fall within the second head, that is to say, is there damage to the plaintiff's person? The proceedings were taken under ss. 94—96 of the Public Health Act, 1875. If the summons had succeeded a fine might have been imposed, and if the fine had not been paid a warrant of distress might have been issued under the Summary Jurisdiction Acts, and in default of goods to satisfy the distress imprisonment might have followed. In that sense, and in no other sense, could the proceedings have resulted in imprisonment. It seems to me that that does not satisfy the second head. There are many proceedings which may result in imprisonment.

(1) 5 Taunt. 187, at p. 191.

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Buckley L.J.

A judgment in an ordinary action of debt may eventually be followed by imprisonment under s. 5 of the Debtors Act, 1869, but it will not satisfy the second head of damage stated by Lord Holt, because the person is not imprisoned by virtue of the proceedings. Imprisonment is only an ultimate result which may follow upon non-compliance with the obligation to pay the money. For these reasons the case does not, in my opinion, fall within the second head.

It remains for consideration whether the case falls within the first head, "damage to his fame, as if the matter whereof he is accused be scandalous." It seems to me that it is necessary, as Bowen L.J. said in *Quartz Hill Gold Mining Co.* v. *Eyre* (1), for the plaintiff to show that damage to his fair fame is the necessary and natural consequence of the proceedings taken against him. It is said that this is a criminal proceeding. I agree that it is in a sense. It is a proceeding which may result in the imposition of a fine for failure to comply with a statutory obligation. In *Reg.* v. *Whitchurch* (2) it was held that an order of justices under these sections of the Public Health Act, 1875, was made in a "criminal cause or matter" within s. 47 of the Judicature Act, 1873. *Rayson* v. *South London Tramways Co.* (3) seems to me to be distinguishable from this case. There it was held that an action for malicious prosecution would lie. The imputation contained in the charge in that case was that the plaintiff was a common cheat, that he had travelled in a tramcar with intent to avoid payment of his fare. That was, no doubt, a charge that the plaintiff had committed a breach of a statutory obligation contained in s. 51 of the Tramways Act, 1870, but the imputation was that he was attempting to cheat the tramway company. That case is no authority in support of the plaintiff's contention. The matter is in a sense criminal, but that does not conclude the question. I have to see whether the institution of these proceedings necessarily and naturally conveyed an imputation affecting the plaintiff's fair fame. There are many proceedings, such as proceedings for obstructing a highway, or for keeping pigs in an improper place, which are in the sense I

(1) 11 Q. B. D. at p. 689. (2) 7 Q. B. D. 534.
(3) [1893] 2 Q. B. 304.

have above indicated criminal. But no one would say that a person's fair fame was affected because he was summoned for keeping a pig in an improper place, or for allowing a dog to wander about unmuzzled contrary to a muzzling order. There is no imputation against fair fame in such a case.

The complaint in the present case was that a certain house was not in such a state of repair as was necessary for the purpose of health and that notice had been served upon the plaintiff as the occupier thereof under s. 94 of the Public Health Act, 1875, requiring him to remedy the same. Sect. 94 provides that "on the receipt of any information respecting the existence of a nuisance the local authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises." Therefore a notice of this kind may be served upon a mere occupier, a person who may be in no way responsible for the state of repair in which the premises are found. He may have gone into occupation the day or the week before, and he may have been properly served with the notice, because the person by whose act, default, or sufferance the nuisance arose or continued cannot be found. How does that affect his fair fame? There is no evidence that the proceedings, which originated in the letter written by the plaintiff's wife, affected his fair fame. It seems to me that in these circumstances the plaintiff has not succeeded in bringing this case within any one of the heads of damage specified by Lord Holt as being sufficient to support the action. For these reasons I think that the action cannot be maintained and that judgment must be entered for the defendants.

[His Lordship also said that in his opinion the findings of the jury upon the question of malice were against the weight of the evidence and were inconsistent findings, and that the damages were excessive, but these questions became immaterial in view of his decision that the action was not maintainable.]

PHILLIMORE L.J. I agree. I assume that this was a prosecution in a criminal matter, but that, in my opinion, is not sufficient

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to support an action for malicious prosecution. The three canons laid down by Lord Holt in *Savile* v. *Roberts* (1) have been accepted ever since, and they were specially referred to with approval by this Court in *Quartz Hill Gold Mining Co.* v. *Eyre.* (2) Those canons or conditions of such an action are, first, that there must be damage to a man's fame, as if the matter whereof he is accused be scandalous; secondly, damage to the person, as where a man is put in danger to lose his life, or limb, or liberty; and, thirdly, damage to a man's property, as where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused. This last head of damage was held to apply in *Savile* v. *Roberts* (3) and the action was held to be maintainable. The only expenses in the present case are the difference between the costs allowed to the plaintiff by the justices and the additional costs incurred by him in defending the proceedings. So far, at any rate, as this Court is concerned, we are bound to hold—and I see no reason to dissent from this view—that those extra expenses are not legal damages. The next question is whether the plaintiff was put in danger to lose his liberty. In my opinion he was not. It is quite true that if upon the hearing of the summons an order had been made against him, not merely to cleanse the rooms, but to pay a penalty or costs, and he did not pay, and a warrant of distress was issued and no sufficient distress was found upon his premises, he might have been sent to prison. But that very remote consequence is not the danger to liberty to which Lord Holt referred in *Savile* v. *Roberts.* (1) Many civil actions even now, and most civil actions before the Debtors Act, 1869, entitled "An Act for the abolition of imprisonment for debt," &c., might result in the restraint of a man's liberty. That has never been considered as sufficient to support a suggestion that the man's liberty is put in peril within the head of damage stated by Lord Holt. Every case where an injunction is obtained against a person may lead to a motion for committal for contempt of Court and to the defendant being sent to prison. An analogy, as Bowen L.J. said in *Quartz Hill Gold Mining Co.* v. *Eyre* (4),

(1) 1 Ld. Raym. at p. 378.
(2) 11 Q. B. D. at pp. 683, 689.
(3) 1 Ld. Raym. 374.
(4) 11 Q. B. D. at p. 692.

may be found in the law of slander. *Ogden* v. *Turner* (1) and *Hellwig* v. *Mitchell* (2) show that, though an action of slander will lie without proof of special damage where the words impute the commission of a crime, "crime" means a crime which will end in imprisonment and not a crime which will end in a fine, though that fine can, like any debt to the King, be enforced by restraint of the person. Therefore that head of damage is not satisfied in this case.

There remains the last head of damage, namely, that to a man's fame, as if the matter whereof he is accused be scandalous. Lord Holt said (3) that "there is no scandal in the crime for which the plaintiff in the original action was indicted." The plaintiff there was indicted on two indictments for having on two separate days with a number of other persons riotously assembled and stopped with posts, fences, and bars a road which belonged to the prosecutor and which he used for carrying his tithes of grain and hay. I do not know what was proved on those indictments, but Lord Holt said summarily that there was no scandal in the crime for which the plaintiff was indicted. It seems to me that what one must look at is, not what might be proved in the course of a prosecution, but what is enough to support a conviction upon the information or indictment. If it will be enough to support a conviction upon the information or indictment that the person charged has done something which does not injure his fair fame, no scandal is involved in the prosecution. In the present case the only complaint is that the plaintiff, being the occupier of a house and having had a notice served upon him to strip the paper off the walls in certain rooms and to cleanse the rooms within twenty-one days, has not complied with the notice. It does not follow that he is responsible for the condition of the premises, or responsible for any appreciable length of time. Sect. 94 of the Public Health Act, 1875, says that the occupier, in the absence of the person by whose act, default, or sufferance the nuisance arose, may be served. It seems to me that it would be going too far to say that that kind of prosecution involves a scandal. In this connection I

(1) 6 Mod. 104. (2) [1910] 1 K. B. 609.

(3) 1 Ld. Raym. at p. 378.

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may refer to *Byne* v. *Moore* (1) and *Freeman* v. *Arkell.* (2) In both those cases, no doubt, the grand jury ignored the bills, so that they did not ripen into indictments, but I do not think that that makes any difference. In some ways indeed it operates more favourably for the person complaining of malicious prosecution, because the antidote, of which Bowen L.J. spoke (3), can never be applied inasmuch as the man is never put upon his defence, the bill having been ignored by the grand jury. Be that as it may, in those two cases the Courts said that the charges there, which were charges of assault, did not necessarily involve scandal. With regard to *Rayson* v. *South London Tramways Co.* (4), I agree that Lord Esher M.R. in the course of his judgment, with which the other members of the Court agreed, used general language which seems to eliminate the question of scandal altogether. We must, however, remember the point to which the arguments of the unsuccessful appellants were addressed and to which the Court addressed itself. It was not contended—it could not have been contended—that the proceedings did not involve damage to the fair fame of the plaintiff. It was a charge of cheating. The only point that could be put was that the proceedings were not criminal proceedings, and it was to that point that the arguments and the judgment were addressed. It may be unfortunate that it did not occur to some member of the Court that a caution should be inserted with regard to the special circumstances of the case. It is clear from the report that the question of scandal was not present to the minds of the Court, because it was not made a point of importance in that particular case. If it was a criminal prosecution, then it was a prosecution involving scandal. "Scandal," as the cases show, means something derogatory to the fair fame of the person charged; and to me guided by the decisions and applying one's common sense there seems to have been no imputation involving scandal on the plaintiff in the present case. The case of *Quartz Hill Gold Mining Co.* v. *Eyre* (5) shows that there are certain forms of civil proceedings, though within very narrow limits, which may

(1) 5 Taunt. 187.
(2) 3 Dow. & Ry. 669.
(3) 11 Q. B. D. at pp. 689, 691.
(4) [1893] 2 Q. B. 304.
(5) 11 Q. B. D. 674.

give rise to an action for malicious prosecution, because, as the Court says, the bane comes before the antidote, and mischief may be done which it will be too late to overtake. I think that Sir Herbert Stephen is right in his book on Malicious Prosecution, p. 19, in treating an action for maliciously taking proceedings in bankruptcy and that class of action as not being strictly actions for malicious prosecution, but closely analogous thereto. Upon the whole I come to the conclusion that this is not a case in which an action for malicious prosecution will lie. I cannot help thinking that the element of costs bulked largely in the action for malicious prosecution. If the subject when prosecuted by the Crown could have recovered his costs of defending himself I doubt whether the action would have been allowed to flourish. However that may be, the element of costs not coming in here and the element of imprisonment not coming in in any direct way, I do not think there is that element of scandal which is sufficient to support the action. There must therefore be judgment for the defendants.

[His Lordship also said that the verdict was unsatisfactory and the damages were excessive.]

PICKFORD L.J. I am of the same opinion. The only ground for the maintenance of this action which I think it is necessary to consider is whether the prosecution as a necessary and natural consequence would impair the fair fame of the plaintiff. Horridge J. has held that it would, and I must say that, looking at the case of *Rayson* v. *South London Tramways Co.* (1), it would have been difficult for him to decide otherwise. I do not say that technically he might not have escaped from the reasoning of Lord Esher M.R. in that case, inasmuch as the reasoning went far beyond what was necessary for the decision, but I doubt whether the learned judge, sitting as a Court of first instance, could very well have disregarded it. The reasoning there came to this, that if there is a prosecution for an act which is a breach of a statutory obligation, and therefore a misdemeanour at common law, and if no penalty were prescribed by the statute creating the offence, it would be punishable upon indictment as

(1) [1893] 2 Q. B. 304.

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a misdemeanour by fine or imprisonment; and that therefore the action for malicious prosecution was maintainable, presumably because it was a prosecution which reflected on the fair fame of the person prosecuted. That seems to me to have been Lord Esher's reasoning. I think that in this Court we are entitled to consider whether we approve of that reasoning. The decision there is quite right, that a prosecution of a man for attempting to avoid payment of his fare in a tramcar is a prosecution for an act which reflects upon that man's character. It is a prosecution in respect of a dishonest act. The decision therefore is right, but the statement that wherever there has been a breach of a statutory obligation a prosecution for that necessarily reflects upon the fair fame of the person prosecuted, because if no special penalty were provided by the Act he might be liable to imprisonment, is a proposition which, in my opinion, cannot be maintained. It seems to me that we have not to consider what facts might be proved in order to support the prosecution, but whether the charge of itself as a necessary and natural consequence impairs the fair fame of the person against whom it is made. It has been pointed out that everything punishable by a fine does not necessarily reflect upon the fair fame of the person prosecuted. There are many prosecutions which might be mentioned, such as a prosecution for not carrying a light on a bicycle, or a prosecution for keeping a pig in a wrong place, which cannot be said to reflect upon the fair fame of the person prosecuted, but it is possible that in any of those prosecutions evidence might be given which might raise an imputation against him. That is not what we have to look at. We have to look at the charge itself. In the present case the charge is that the plaintiff was duly served with a notice from the urban sanitary authority requiring him as the occupier of certain premises within twenty-one days from the service of the notice to strip paper off the walls of certain rooms and to cleanse and distemper the ceilings and walls, and that he failed and neglected to comply with the said notice. That charge does not seem to me to contain any imputation against the fair fame of the plaintiff. As has been already pointed out, he was served as the occupier, and that does not necessarily mean that the condition of the premises was caused

by his act or default. He may have only just come into occupation. There may have been a strike of workmen or many other things which may have been the cause of his failure to comply with the notice. I do not know whether the prosecution thought that they could prove that the state of the premises was owing to his default or not. We have to look at the charge as stated in the summons, and it does not seem to me as a necessary and natural consequence to impute anything against the plaintiff's fair fame. For these reasons I think that this action cannot be maintained, and judgment must be entered for the defendants.

[His Lordship also thought, though it was not necessary to consider it, that the findings of the jury were so inconsistent that there must have been a new trial, and that the damages were excessive.]

Appeal allowed.

Solicitors for plaintiff: *Lloyd Richardson & Co.*
Solicitors for defendants: *Hunt & Hunt.*

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[COURT OF CRIMINAL APPEAL.]

THE KING *v.* AHLERS.

Criminal Law—High Treason—Adhering to and aiding the King's Enemies—Assisting German Subjects to return to Germany after Declaration of War—Intention—Direction to Jury.

The appellant was convicted on an indictment for high treason which charged him with adhering to and aiding the King's enemies. The evidence for the prosecution showed that on August 5, 1914, the appellant, who was a British subject and who, up to the time when war was declared, was German Consul at Sunderland, had assisted German subjects, of an age which rendered them liable for military service, with money and information in order to enable them to return from England to Germany. A state of war existed between the United Kingdom and Germany as from 11 P.M. on August 4. The judge directed the jury that, if they found on the evidence that the appellant had assisted the King's enemies in the above manner at a time when he knew that war had been declared between this country and Germany, it was their duty to find him guilty, and that it was no defence for the appellant to say that he believed that he was lawfully entitled to act as he did even after the declaration of war :—

Held, that the jury should have been told that they must consider whether the acts of the appellant were done by him with the intention of assisting the King's enemies, or whether he acted without any evil intention and in the belief that it was his duty to assist German subjects to return to Germany, in which case he would be not guilty ; and that in the absence of any direction to this effect the conviction must be quashed.

APPEAL against a conviction for high treason at the Durham Autumn Assizes.

The first count of the indictment alleged that on August 5, 1914, and continually from thence an open and public war was being prosecuted by Wilhelm, the German Emperor, and his subjects against the King and his subjects, the said German Emperor and his subjects then being enemies of the King, and that the appellant, then being a subject of the King and well knowing the premises, and contriving and intending to aid and assist the said enemies of the King during the war, on August 5, 1914, at Sunderland, in the county of Durham, maliciously and traitorously was adhering to, aiding, and comforting the King's

said enemies. The overt act alleged was the endeavour to procure one Martin, a German subject, to leave England and go to Germany and there enter the military service of the German Emperor.

In the second count the overt act alleged was that, with the intent aforesaid, the appellant on August 5, 1914, caused to be published to Martin a document in German signed by the appellant, the translation of which was as follows:—"Sunderland, August 5, 1914. Imperial German Consulate. All men able to bear arms, between the 17th and 45th year, are requested to report themselves at once to the Consulate, and bring with them any military papers or other credentials. The Imperial Consul, Ad. Ahlers."

The third and fourth counts alleged similar overt acts on August 5 with regard to one Körfer, a German subject.

The fifth count alleged an overt act, similar to that alleged in the first count, on August 6 with regard to one Biemann, a German subject, and the sixth count alleged that on August 6, with the intent aforesaid, the appellant paid to Biemann the sum of 2*l.*

There were other counts alleging similar overt acts on August 5 with regard to a number of German subjects, named and unnamed.

The appellant was by birth a German subject. He had lived in England for about thirty years and in 1905 he had become a naturalized British subject. In August, 1914, he was the German Consul at Sunderland, having held that office since 1905.

On August 1, 1914, Germany declared war against Russia, and on August 3 against France. A supplement to the *London Gazette* of August 4 was published on August 5 containing an announcement dated August 4, issued by the Foreign Office, that a state of war existed between Great Britain and Germany as from 11 P.M. on August 4.

The evidence for the prosecution showed that for a few days before August 5 and on that day the appellant had been engaged in obtaining the names of German subjects resident in the county of Durham who were of an age liable to military service, including those named in the indictment, and assisting them to return to

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Germany by providing them with money and railway and steamboat tickets and supplying them with information as to routes by which they could travel.

At the close of the case for the prosecution, counsel for the appellant submitted, first, that the offence charged was not committed unless it was proved that at the time of the acts done by the appellant on August 5 the appellant knew that Great Britain was then at war with Germany, and that there was no evidence that he had that knowledge; and, secondly, that it was not unlawful for the men in question to leave this country on August 5, and that consequently the appellant was not guilty of any offence in helping them to do so. He referred to the Aliens Restriction Order, 1914, and the notice of the Home Secretary issued thereunder. (1)

The learned judge (Shearman J.), while doubting whether it was necessary for the prosecution to prove knowledge of the declaration of war, held that there was evidence that the appellant

(1) Aliens Restriction Act, 1914 (4 & 5 Geo. 5, c. 12), s. 1: "(1.) His Majesty may at any time when a state of war exists between His Majesty and any foreign power, ... by Order in Council impose restrictions on aliens, and provision may be made by the Order—

. . . . .

"(*b*) for prohibiting aliens from embarking in the United Kingdom, either generally or at certain places, and for imposing restrictions and conditions on aliens embarking or about to embark in the United Kingdom."

By the Aliens Restriction Order, 1914 (No. 1161), which was made on August 5 and published in the *London Gazette* of August 6, certain named ports were declared to be "approved ports" and any other port in the United Kingdom was declared to be a "prohibited port." By art. 8 "An alien shall not, except in pursuance of an order of deportation under this Order, embark in the United Kingdom at a prohibited port." Art. 10: "As from a date to be fixed by a Secretary of State an alien enemy shall not, except in pursuance of an order of deportation under this Order, embark in the United Kingdom at an approved port, unless provided with a permit issued by a Secretary of State."

A notice issued to shipping companies on August 5 by the Home Secretary in pursuance of the Order stated that on and after August 6 alien enemies, i.e., at the date of the notice subjects of the German Empire, would be allowed to embark at approved ports only when furnished with a permit from a Secretary of State, "provided that alien enemies may embark at approved ports without such permits before August 11."

knew on August 5 of the declaration of war. (1) He also ruled against the second contention.

The appellant gave evidence, and stated that at the time he did the acts alleged on August 5 he did not know that war had been declared between Great Britain and Germany. He further stated that he was under the impression that after a declaration of war between two countries the subjects of one of the countries living in the other country were allowed a reasonable margin of time in which to return to their own country. On the evening of August 4 he had received the following telegram from the German Chief Consul in London: "All able-bodied men from 17 to 45 have to try to find their way to Germany send no one here aid needy ones."

Shearman J. told the jury that if they found on the evidence that the appellant had assisted the King's enemies at a time when he knew that war had been declared between Great Britain and Germany, it was their duty to find him guilty; and that in that case it was no defence for the appellant to say that he thought he was entitled to do what he had done even after the declaration of war. The learned judge further told the jury that the Aliens Restriction Order and notice, which the appellant had never seen, had nothing to do with the case. The jury returned a verdict of guilty, and the appellant was sentenced to death.

The learned judge gave a certificate that it was a fit case for appeal, on both fact and law.

Tindal Atkinson, K.C. (*Mundahl* with him), for the appellant. First, there was no evidence fit to be submitted to the jury that at the time the appellant committed the acts alleged on August 5 he knew that a state of war existed between Great Britain and Germany. Everything which he did on that day is consistent with his knowing only that war had been declared by Germany against Russia and France. It is not enough for the prosecution

(1) In view of the grounds upon which the Court eventually quashed the conviction it has been thought unnecessary to set out in detail the evidence relied on by the prosecution as showing that the appellant knew on August 5 that war had been declared.

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to show that the appellant must have suspected that war had been declared by England. Unless and until the appellant had definite official knowledge that this country was at war he was entitled in the performance of his official duties as Consul to act as he did. Public notoriety may be evidence of the fact that there is a state of war existing, but it is not evidence of the knowledge by a particular individual of that fact.

Secondly, it was not unlawful for German subjects who were in this country to return to Germany on August 5, and the appellant in assisting these men to depart was, therefore, not guilty of high treason. The modern practice of nations is that after the declaration of war enemy subjects have a reasonable time in which to depart from the belligerent country and return to their own land: Hall's International Law, 6th ed., p. 385. This practice has been incorporated into the notice issued by the Home Secretary in pursuance of the Aliens Restriction Order, which provides in express terms that all alien enemies, i.e., German subjects, may embark at an approved port without a permit up to August 11. This notice is quite unqualified and contains no exception excluding men of a military age. It is true that the appellant never saw that notice, but it shows that the view which he took of the position was the right one. This point is material on the question of mens rea. If the appellant acted as he did, not with the intention of aiding the King's enemies, but because he conceived it to be his duty as Consul to assist them to do what they had a perfect right to do, namely, to go back to Germany, then the intent which is the essence of high treason would not have been proved. But Shearman J. never directed the attention of the jury to this aspect of the case, and the jury were left under the impression that if the appellant knew on August 5 that war had been declared they were bound to convict him.

[LORD READING C.J. We should like to hear the other side on this point.]

Sir S. O. Buckmaster, S.-G. (with him *Scott Fox, K.C., Branson*, and *Coutts Trotter*), for the Crown. It is quite clear that, apart from the provisions of this Order in Council and the Home Office notice, it would be unlawful for a British subject, knowing

that this country was at war with Germany, to assist German subjects to leave this country in order that they may fight against the King's forces. That is what the jury have found by their verdict that the appellant did. It is a startling proposition that an Order in Council has made it lawful for a British subject, when England is at war with Germany, to levy a German regiment in this country and to arrange for its departure to Germany for the purpose of joining the enemy's forces. But an examination of the Aliens Restriction Act, 1914, and the Order in Council made thereunder shows that the contention of the appellant is unfounded. The Aliens Restriction Act, 1914, is an Act which altered the common law by conferring upon a Secretary of State powers to prohibit aliens from landing and embarking in this country. The powers are to be imposed by Orders in Council. The Order in Council and the Home Secretary's notice fix August 11 as the date on and after which an alien enemy shall not embark at an approved port unless provided with a permit. The effect of that is that from the outbreak of war till August 11 the conditions under which alien enemies might leave this country remained the same as they were before the Act; after that date the restrictions apply. Neither the Order in Council nor the Home Secretary's notice can be read as enabling alien enemies to leave this country who would not otherwise have been entitled to do so, and they have no application to the case of alien enemies leaving this country in order to join the German army. If that was their effect, they would be ultra vires, for the Act which authorizes the Order in Council is a restricting, not an enabling Act. Neither the common law nor statute law can be altered by an Order in Council, unless the Act under which the Order in Council is made authorizes it. The learned judge was therefore right in telling the jury that the Order in Council and the notice had nothing to do with the case. If he had referred to it he must have told them as a matter of law that it did not support the appellant's contention. There was no misdirection of the jury. The main defence was that the appellant did not know that war had been declared. On the evidence the jury were entitled to, and did, disbelieve the appellant's evidence as to that.

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[LORD READING C.J. We are all of opinion that there was evidence on which the jury could find that the appellant knew of the declaration of war.]

The only other defence suggested by the appellant at the trial was that he believed that what he was doing was lawful even if war had been declared. That was no defence in law, and was of course inconsistent with his statement that he was unaware of the declaration of war. It was never suggested at the trial that the appellant might have been sending these men, who were all of military age, to Germany for some other purpose than that of joining the German army. There was therefore no necessity for the judge in summing up to direct the attention of the jury to that question.

Tindal Atkinson, K.C., replied. [He referred to Cobbett's Leading Cases on International Law, 3rd ed. pt. ii., p. 58.]

The judgment of the COURT (Lord Reading C.J., Darling, Bankes, Lush, and Atkin JJ.) was delivered by

LORD READING C.J. The appellant was convicted of high treason by "adhering to and aiding and comforting" the German Emperor and his subjects, then enemies of the King, and he was sentenced to death. The learned judge at the trial granted a certificate in order that the case might be brought before this Court both on the facts and on the law, expressing his view that it was a case which should properly be brought before this Court. The facts, so far as they are material, may be shortly stated. The appellant was a German-born subject, who had resided in England for some thirty years, and in the year 1905 had become naturalized under the Act of 1870. Thenceforward he was a British subject, with all the rights and liberties and obligations of a British subject. He acted as the German Consul at Sunderland. On August 1 Germany declared war against Russia, and on August 3 Germany declared war against France. On August 4 an ultimatum was issued by this country to Germany, and, in the result, at 11 o'clock on the night of August 4 a state of war began between this country and Germany. That declaration on that state of war was announced in the *London Gazette* of August 5. That is the evidence of the fact of the

existence of war and it is not in controversy. During the first days of the month of August the appellant in his capacity of German Consul had taken various steps for the purpose of assisting German subjects who were resident in this country to return to their own country. That was in pursuance of his duty. He was entitled according to the law of England to assist these German subjects to return although their purpose was to perform military duty when they arrived in Germany. On the morning of August 5 he read a daily newspaper in which there was a statement that war had been declared between this country and Germany at 7 P.M. on August 4. The statement was not accurate as to the time, but that is immaterial for this purpose, as the fact is established by the official document that a state of war had commenced at 11 P.M. on August 4. On the 5th the appellant undoubtedly, according to the evidence, which is on this point not substantially in dispute, did certain acts, such as assisting two of the persons mentioned, Martin and Körfer, to return to Germany.

It is to be borne in mind that at that moment, according to the statement which the appellant made, although he had read in the newspaper that there had been a declaration of war or that a state of war had commenced, he did not believe it; he still thought that action might be taken by Germany which would prevent war between Germany and this country, and he continued in his capacity of German Consul the policy which he had been pursuing for the last three or four days, before war had commenced between Germany and ourselves; that is, this policy of assisting German subjects who were of military age to return to Germany. I should add that there is possibly some slight evidence that on the morning of August 6 he continued to perform acts of that character. He was arrested on August 6, and eventually was charged with high treason.

The defence in the main consisted of a denial by him that he knew that there had been a declaration of war, or that a state of war existed at the time that he did the acts on August 5 and possibly on the morning of the 6th, but it is clear from the statements made by himself that he did know at some time during August 5 that war had commenced. The evidence as

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to the 6th is not satisfactory because the acts charged against him in the indictment were done in pursuance of a policy which had been followed and for which it may be said orders had been given before August 6; so that in our opinion the matter ought to be considered solely in reference to what the appellant did on August 5. He had received, on the evening of August 4, instructions by telegram from his Consul-General, and he thought that he was justified in continuing to act on the 5th as he had done on the 4th and 3rd; it must further be borne in mind that his acts were official acts, as he thought, and that they were done quite openly.

On August 5 an Act of Parliament was passed called the Aliens Restriction Act, 1914, and on the same day an Order in Council was issued in pursuance of that statute, and also on the same day a notice was issued by order of the Secretary of State for the Home Department, in pursuance of the Order in Council, which stated that alien enemies, that is, in this connection German subjects, might depart from this country at certain approved ports without a permit up to August 11.

It is true that the appellant, according to the evidence, knew nothing of this statute or of the Order in Council or of the notice but he did state in giving evidence that he had a belief that there was a rule of international law which gave a margin of time to subjects of the country at war with us to leave these shores without interference or molestation, notwithstanding that they might be going for military service to their own country. In the course of the argument Mr. Tindal Atkinson on behalf of the appellant relied on the Order in Council and the notice, not as evidence of facts which came to the knowledge of the appellant, but as proof of the reasonableness of the appellant's belief that there would be a margin of time permitted for the departure of German subjects. The appellant stated that his aforementioned belief was induced and assisted by the instructions received from his Consul-General. It is sufficient for the purpose of our judgment in this case to say that the Order in Council and the notice do lend some colour to the reasonableness of the appellant's belief.

It was further contended that the jury ought to have been

told to consider not merely the bare acts of the prisoner, but his intention and purpose in doing them. It cannot be doubted that his intention and purpose in doing the acts were material to the issue which was then before the jury. Unless the jury were satisfied that his intention and purpose in acting as he did were evil, not to use the more stately language both of the statute and of the indictment, and that he was intending to aid and comfort the King's enemies and did these acts with that object, they could not find him guilty of the act charged. He was charged in the words of the indictment with "contriving and with all his strength intending to aid and assist the enemies of our Lord the King against our said Lord the King and his subjects heretofore during the said war . . . . and with force of arms unlawfully maliciously and traitorously was adhering to aiding and comforting the German Emperor against our Lord the King." The defence put forward on his behalf at the trial was that, acting in his capacity of a Consul, and with the belief that he had, his object was to assist German subjects to return to their own country, and that his intention was not in any way to injure this country's interests, but merely to carry out his duty and help these German subjects to return to their own country.

It is not for this Court to pronounce an opinion as to which of those two views was correct. The learned judge dealt most carefully with the facts in summing up the case to the jury, and certainly treated not unkindly the evidence given by the prisoner, but, unfortunately, his attention was centred in the main upon the prisoner's contention that he did not know that war had commenced at the time of doing the acts on August 5, and the learned judge did not put to the jury the alternative views as to his purpose and intention to which we have called attention. It is worthy of observation that the learned judge summed up in this way out of consideration for the prisoner because, in the learned judge's view, the one branch of the defence put forward on behalf of the prisoner was inconsistent with and would prejudice the other, which he thought from the course taken by the defence was the one mainly relied upon. We cannot, however, find that the jury ever had it brought to their

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minds that it was possible, if they chose to adopt the view, that the prisoner was not actuated by the intention and had not the purpose of aiding and comforting the King's enemies. Neither can we say that the jury could not possibly have come to a conclusion favourable to the appellant if those two alternative views had been put before them. As this Court has often ruled, it is not enough to support the conviction that the jury might have come to the same conclusion, had the proper direction been given. Before we can uphold a verdict of guilty after misdirection, we must be satisfied that, had the proper direction been given, the jury must have come to the same conclusion and convicted the prisoner. We cannot so hold in this case. We cannot say that it follows from the evidence that the actions of the appellant were necessarily hostile to this country in intention and purpose; although there was undoubtedly evidence upon which the jury might have so found.

Having come to the conclusion that a material point of the defence was not left to the jury, the Court are of opinion that the conviction cannot stand, and it must be quashed.

Appeal allowed.

Solicitor for appellant: *W. Watts Moses.*

Solicitor for Crown: *Director of Public Prosecutions.*

F. O. R.

BERRY *v.* HUMM & CO.

[1914 B. 154.]

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Jan. 27; *Feb.* 1.

Negligence—Negligence causing Death—Death of Wife—Husband's Pecuniary Loss in replacing Wife's Services—Fatal Accidents Act, 1846 (9 & 10 *Vict.* c. 93)—*Fatal Accidents Act*, 1864 (27 & 28 *Vict.* c. 95).

The plaintiff, a workman earning 38*s.* a week, sued the defendants to recover damages for the death of his wife, who was knocked down by a motor taxicab belonging to the defendants and instantly killed. The wife had performed the ordinary household duties of a woman in her position, and in consequence of her death the plaintiff had to employ a housekeeper and to incur extra expenses of management by the housekeeper instead of by his deceased wife. The jury assessed the plaintiff's damages at 50*l.*:—

Held, that under the Fatal Accidents Act, 1846 (Lord Campbell's Act), the damages recoverable in such an action are not limited to the value of money lost, or the money value of things lost, but include the monetary loss incurred by replacing services rendered gratuitously by the deceased where there was a reasonable prospect of their being rendered freely in the future but for the death, and, therefore, that the plaintiff was entitled to recover the damages assessed by the jury.

Osborn v. *Gillett* (1873) L. R. 8 Ex. 88 and *Clark* v. *London General Omnibus Co.* [1906] 2 K. B. 648 distinguished.

Action tried by Scrutton J. at Exeter.

The plaintiff, who was a workman at Devonport earning 38*s.* a week, sued the defendants to recover damages for the death of his wife, who, while cycling, was knocked down by a motor taxicab belonging to the defendants and instantly killed. The wife had performed the ordinary household duties of a woman in her position and had attended to the one child of the marriage. In consequence of the death of his wife the plaintiff was obliged to employ a housekeeper to perform the ordinary household duties, and to incur other expense for the doing of work in connection with his house which had previously been done by his wife.

The defendants admitted negligence, but contended that the plaintiff had suffered no damage recoverable at law.

The jury assessed the damages at 50*l.*, and, as it was agreed he might do, the judge divided this into 35*l.* for loss of service, or payment of a substituted housekeeper, and 15*l.* for extra expenses of management by a housekeeper instead of by his deceased wife.

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R. E. Dummett (*E. Percival Clarke* with him), for the plaintiff, asked for judgment.

W. T. Lawrance (*J. L. Pratt* with him), for the defendants. The plaintiff's claim is merely for loss of the services of his deceased wife, and consequential damage. Such a claim is not maintainable: *Osborn* v. *Gillett* (1); *Clark* v. *London General Omnibus Co.* (2) In *Jackson* v. *Watson & Sons* (3) the circumstances were that the plaintiff's wife died after eating salmon sold by the defendants, and the plaintiff was held entitled to recover damages in respect of the loss of his wife's services. But that was an action for breach of a warranty that the salmon sold by the defendants was fit for consumption as human food, and that being so, the case was treated as an exception to the rule that the death of a human being cannot be complained of as an injury. *Osborn* v. *Gillett* (1) and *Clark* v. *London General Omnibus Co.* (2) were there held to be binding. The Irish case of *Wolfe* v. *Great Northern Ry. Co.* (4) may seem to be against the present contention. In that case a girl aged ten was killed by the negligence of the defendants. The girl had rendered services at home and thus enabled her parents to dispense with a servant whom they had previously employed. After the girl's death her parents were obliged to employ a servant again. The father was held entitled to recover damages from the defendants in respect of the loss of his daughter's services. That case went further than any other on this particular point; but it is to be noted that the evidence disclosed that the girl was preparing for employment in the post office for which she would have been eligible on attaining fifteen or sixteen years of age, and she might thus have earned something which she would have brought into the household for family purposes. It was not a case, therefore, of a claim for mere loss of services. The case of *Taff Vale Ry. Co.* v. *Jenkins* (5) turned entirely upon the point that there was a reasonable anticipation that the daughter, in respect of whose death the action was brought, would earn money in the future and that her earnings would enure, in part at all events, for the benefit of her parents.

(1) L. R. 8 Ex. 88.
(2) [1906] 2 K. B. 648.
(3) [1909] 2 K. B. 193.
(4) (1890) 26 L. R. Ir. 548.
(5) [1913] A. C. 1.

R. E. Dummett in reply. To recover damages under Lord Campbell's Act the plaintiff admittedly must prove pecuniary loss actual or prospective. There is nothing in the statute or the cases which precludes a plaintiff from recovering damages for the loss of services rendered, provided that a pecuniary value can reasonably be placed upon such services. In this case the plaintiff has proved a direct pecuniary loss due to the loss of his wife's services as a housekeeper. Of the cases quoted for the defendants *Osborn* v. *Gillett* (1) is the only one which is, at the first glance, apparently against this contention; but that case really turned upon the question whether or not a master could recover damages for the death of a servant. In *Clark* v. *London General Omnibus Co.* (2) the Court of Appeal merely decided that a father cannot recover, either at common law or under Lord Campbell's Act, the funeral expenses to which he has been put in burying an unmarried infant daughter whose death was caused by the negligence of the defendants. In *Jackson* v. *Watson & Sons* (3) it was held that damage arising from the death may be included where the cause of action is independent of the tort causing the death. Whatever view may be taken of *Osborn* v. *Gillett* (1), the legal position is now determined on this question by the decision of the House of Lords in *Taff Vale Ry. Co.* v. *Jenkins* (4), where the Lord Chancellor said that personal services rendered by a deceased child formed a proper subject for compensation where a pecuniary value could reasonably be put upon them.

Cur. adv. vult.

Feb. 1. SCRUTTON J. read the following judgment:—The plaintiff Alfred Berry claimed damages from the defendants for the death of his wife by the negligence of the defendants' servants. The negligence was admitted, but the defendants contended that the plaintiff had suffered no damage recoverable at law. The evidence given by the plaintiff to prove damage was that he was a workman at Devonport Dockyard earning 38*s.* a week.

(1) L. R. 8 Ex. 88.
(2) [1906] 2 K. B. 648.
(3) [1909] 2 K. B. 193.
(4) [1913] A. C. 1.

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He had been married four years and had one child of three years of age. He had kept no servant, but his wife did all the work of the house and looked after the child. Since the death of his wife he was obliged to employ a housekeeper, whom he paid 5*s.* a week and her board, and he said he only obtained her at that low rate because she lived next door. He further said that his late wife had herself made the bread and did everything in the house, and that before the war began he found that the house as managed by a housekeeper instead of his wife was costing him 3*s.* a week more, 20*s.* instead of 17*s.* I directed the jury to assess the pecuniary damage the husband had sustained by the death of his wife, omitting all compensation for wounded feelings or funeral expenses, and considering the cost of the wife's maintenance, clothing, and pocket money which the husband was saved by her death, the chance of the husband marrying again, and of his or the child's death. The jury assessed the damage at 50*l.*, and, as it was agreed I might do, I divide this into 35*l.* for loss of service, or payment of a substituted housekeeper, and 15*l.* for extra expenses of management by a housekeeper instead of by this wife.

Counsel for the defendants then argued that this sum was not recoverable in that damages by loss of services by death were not recoverable in tort, even under Lord Campbell's Act, where, as here, the deceased was killed on the spot; and that the only damages recoverable were pecuniary loss where the deceased had made pecuniary contributions in the past, or there was a reasonable probability that he would do so in the future. In reply to questions from me he admitted that the contributions lost by death might be in kind, as where a son gave his mother bread or meat weekly. But he contended that they could not be in services, as where a son worked for his father without wages, or a wife for her husband, and on the death of the son or wife the father or husband had to pay a substitute a fixed sum as wages. He argued that I was bound by the decisions in *Osborn* v. *Gillett* (1) and *Clark* v. *London General Omnibus Co.* (2) to hold that the damages found by the jury were not recoverable.

It is clear that at common law, in the present state of the

(1) L. R. 8 Ex. 88. (2) [1906] 2 K. B. 648.

authorities, the death of a human being could not be complained of as an injury. Why this is so, it is not necessary for me to endeavour to ascertain, as the statement of Lord Ellenborough to that effect in *Baker* v. *Bolton* (1), where a husband claimed damages for the loss of his wife's company by the negligence of the defendant, has been approved in *Osborn* v. *Gillett* (2) and *Clark* v. *London General Omnibus Co.* (3), so that, as stated by the Court of Appeal in the recent case of *The Amerika* (4), it can only be interfered with by the House of Lords. It is otherwise where the death is not part of the cause of action but an element in assessing the damages, as in an action by the husband for a breach of contract causing his wife's death. This was decided also by the Court of Appeal in *Jackson* v. *Watson & Sons.* (5)

But this common law rule in tort has been interfered with by Lord Campbell's Act, which allows the executor of the deceased to bring an action for the benefit of the wife, husband, parent or child of the deceased, in which the jury may award them damages proportioned to the injury resulting to them from the death. While the cause of action fails if the deceased, if alive, could not have recovered damages for the negligence, the measure of damages is quite different. It excludes compensation for injury to the deceased, or for the wounded feelings of his relatives, and is based solely on compensation for a pecuniary loss to the relatives, assessed either on the loss of such contribution in the past, or on the loss of a reasonable expectation of pecuniary benefit in the future: see the judgments in *Taff Vale Ry. Co.* v. *Jenkins.* (6) I can see no reason in principle why such pecuniary loss should be limited to the value of money lost, or the money value of things lost, as contributions of food or clothing, and why I should be bound to exclude the monetary loss incurred by replacing services rendered gratuitously by a relative, if there was a reasonable prospect of their being rendered freely in the future but for the death. Apart from principle, such matters have been taken into consideration in the reported cases.

For instance, in *Taff Vale Ry. Co.* v. *Jenkins* (6) the daughter,

(1) (1808) 1 Camp. 493.
(2) L. R. 8 Ex. 88.
(3) [1906] 2 K. B. 648.
(4) [1914] P. 167.
(5) [1909] 2 K. B. 193.
(6) [1913] A. C. 1.

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who was just finishing her apprenticeship as a dressmaker, also gave her mother some assistance in her greengrocer's shop. The jury gave 75*l.* damages to the father and mother. On objection that the damages were excessive, the Lord Chancellor said "there is material on which the jury might think that she might have given some assistance in the shop which her mother kept . . . . the jury may reasonably have taken the view that the amount of assistance which she would have given at home to the parents would have been considerable . . . . It may have thought that the value to these ageing parents of the prospective assistance of the daughter amounted in a pecuniary point of view to 75*l.*; it may have thought that without her they would have had to employ a servant or to get in some assistance." All these reasons for the judgment were erroneous if the argument of the defendants is correct. In *Franklin* v. *South Eastern Ry. Co.* (1) the son did work for the father gratuitously for which the father received 3*s.* 6*d.* a week, and the Court of Exchequer treated this as evidence on which a reasonable expectation of pecuniary benefit in the future could be found. It was held otherwise in *Sykes* v. *North Eastern Ry. Co.* (2), where the son was employed by the father, but paid full wages, Brett J. saying that the full amount of wages paid gave no evidence of pecuniary benefit from relationship. In the Irish case of *Wolfe* v. *Great Northern Ry. Co.* (3) the deceased daughter did the work of the house for her father, who had previously employed a servant at 8*l.* a year, and now had to employ one at 3*s.* 6*d.* a week, and six judges of the Irish Court of Appeal, in separate judgments, held this a proper subject for consideration in assessing the father's pecuniary loss.

But it was said that the English decisions in *Osborn* v. *Gillett* (4) and *Clark* v. *London General Omnibus Co.* (5) bound me to reject this head of damage. It is clear that the decision in *Clark's Case* (5) does not so bind me for the reason that though the father claimed damages for loss sustained by the loss of the services of his daughter the jury found that he had sustained no such damage,

(1) (1858) 3 H. & N. 211.
(2) (1875) 44 L. J. (C.P.) 191.
(3) 26 L. R. Ir. 548.
(4) L. R. 8 Ex. 88.
(5) [1906] 2 K. B. 648.

and the only question really decided was whether at common law or under Lord Campbell's Act he could recover funeral expenses. *Osborn* v. *Gillett* (1) has given me more trouble. The declaration alleged that the deceased was the daughter and servant of the plaintiff, and that the defendant's negligence killed her, whereby the plaintiff lost the services of his daughter. The relevant plea was that the daughter was killed on the spot. I cannot conceal from myself that, if the view I have already expressed is right, this action should have succeeded under Lord Campbell's Act, if suitable facts were proved. But I cannot find that the question of Lord Campbell's Act in the case of father and daughter was considered by the Court at all. The case was argued as one of master and servant, and it was pointed out that Lord Campbell's Act does not include this relationship, which is true in that a master, not a father or husband, cannot claim for the instant death of his servant, not being his wife, son, or daughter rendering him services of pecuniary value. The head-note begins: "A master cannot maintain an action for injuries which cause the immediate death of his servant." I do not understand why the Court did not consider the question whether a father who suffered pecuniary loss by the death of his daughter, who rendered him gratuitously services of pecuniary value which it caused him pecuniary loss to replace, could recover it, but it seems to me they did not. This being my view of *Osborn* v. *Gillett* (1), and having regard to the Lord Chancellor's remarks in *Taff Vale Ry. Co.* v. *Jenkins* (2), I do not feel bound by it. I see no distinction between the two heads of damage claimed, and I enter judgment for the plaintiff for 50*l.* and costs.

Judgment for plaintiff.

Solicitors for plaintiff: *Rundle & McDonald, Devonport.*
Solicitor for defendants: *J. W. Bickle, Plymouth.*

(1) L. R. 8 Ex. 88.

(2) [1913] A. C. 1.

J. S. H.

C. A.
1914
Oct. 14.

[IN THE COURT OF APPEAL.]

DOBSON AND ANOTHER *v.* HORSLEY AND ANOTHER.

[1910 D. 1483.]

Negligence—Dangerous Premises—House let out in Single Rooms—Flight of Steps in Possession of Landlord—Defect in Railing at Side of Steps—Liability of Landlord to Infant Son of Tenant—Knowledge on Part of Tenant of Defect in Railing.

The defendants were the owners of a house, one room in which was let by them to the adult plaintiff, the father of the infant plaintiff. The front door of the house was approached from the street by a flight of steps, these steps being protected on each side by a railing, but at the time of the letting of the room one of these railings was defective, one of the upright bars in the railing being missing. On either side of the steps was an area. The steps were not let with the room, but remained in the possession and control of the defendants. The infant plaintiff, a boy of about 3½ years old, while playing on the steps, fell through the aperture caused by the missing railing into the area below and was severely injured. In an action claiming damages from the defendants in respect of the injuries, the jury found that the railings were in a defective condition at the time of the letting so as to be dangerous to children:—

Held, that the absence of the railing was not in the nature of a trap or concealed danger, and that therefore the plaintiffs had established no cause of action against the defendants.

Miller v. *Hancock* [1893] 2 Q. B. 177 considered and distinguished.

APPLICATION of the plaintiffs for judgment or for a new trial of an action tried before Ridley J. and a common jury.

The plaintiffs were an infant, suing by his father as his next friend, with whom his father was joined as a co-plaintiff, and the claim was to recover damages for injuries sustained by the infant plaintiff through the alleged negligence of the defendants. The defendants were the owners of a four-roomed house, one room in which they had let to the adult plaintiff at a rent of 3*s.* 6*d.* per week. The house was approached from the street by a flight of steps crossing an area eight or nine feet in depth; the steps were protected by railings on each side, but these railings were in a defective condition, and one railing on one side was

missing. It was alleged that at the time of the letting the adult plaintiff was aware of the defective condition of the railings, and that after going into possession of his room he called the attention of defendants' agent to the absence of the railing, and that the latter promised to remedy the defect but failed to do so. The steps were not included in the letting to the plaintiff, which was confined to the room in the house. One day the infant plaintiff, a child of about three and a half years old, while playing with a toy on the steps, fell through the gap in the railings into the area below and was seriously injured. The plaintiffs in the statement of claim alleged both negligence on the part of the defendants and also that the want of repair of the railings caused a danger and a nuisance to persons lawfully using the premises. At the trial Ridley J. left the following questions to the jury:—(1.) Were the railings in a defective condition at the time of the letting so as to be dangerous to children? Answer: Yes. (2.) Was the complaint made to the defendants' agent before the accident happened? The jury were unable to agree as to the answer to this question. (3.) Damages? Child, 135*l.*; father, 2*l.* 15*s.* Ridley J., on the authority of *Cavalier* v. *Pope* (1), gave judgment for the defendants.

The plaintiffs appealed.

Dunbar and *A. B. Ashby*, for the plaintiffs. In *Cavalier* v. *Pope* (1) the action was by husband and wife for damages for breach of contract (not for tort) resulting in injury to the wife, the injury being received in the interior of the demised premises, and the decision went on the ground that the landlord owed no duty to the wife because she was not the tenant. In *Huggett* v. *Miers* (2) each tenant had an apparatus outside the door of his flat which controlled the lighting of the staircase, and it was held that there was no duty in the landlord to light the staircase and that he was not responsible for injuries sustained by the plaintiff while coming down the staircase in the dark. In the present case the defendants must be taken to have retained the control of the steps. The case is on all fours

(1) [1906] A. C. 428. (2) [1908] 2 K. B. 278.

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with and is governed by *Miller* v. *Hancock*. (1) There a stranger while using the staircase of a building let out in sets of offices, the staircase being in the control of the landlord, fell and was injured through the defective condition of one of the stairs, and it was held that there was by necessary implication an agreement by the landlord with his tenants to keep the staircase in repair, and that, as the landlord must have known and contemplated that it would be used by persons having business with them, there was a duty on his part towards such persons to keep it in a reasonably safe condition and he was therefore liable. All the judgments in *Cavalier* v. *Pope* (2) are consistent with the decision only referring to accidents occurring on the demised premises and not to accidents occurring to portions of the premises of which the landlord retains possession and control. The cases of *Lucy* v. *Bawden* (3) and *Ryall* v. *Kidwell* (4) are distinguishable. In the former case the house was approached by a flight of steps having a coping about eight inches high on each side, but no railing, and the wife of one of the tenants slipped on the steps and fell into the area owing to the absence of a railing; it was held that the only obligation upon the landlord in reference to the approach to the house was to avoid exposing the plaintiff to any unexpected danger without giving her warning, and that as the danger was patent to every one, and the plaintiff in fact knew of it, she had voluntarily taken upon herself to bear the risk, and therefore had established no cause of action. The latter case depended upon the construction of ss. 14 and 15 of the Housing and Town Planning Act, 1909, and it was held that their effect is to import into the contract of tenancy an implied undertaking by the landlord towards the tenant alone that the demised premises shall be during the holding in all respects reasonably fit for human habitation, and that a stranger to the contract of tenancy has no remedy for a breach of the implied undertaking; besides, the accident in that case happened on the demised premises. Looking at the age of the child in the present case, the missing railing must have been in the nature of a trap; he was of such tender years that he could not be expected to know of the danger.

(1) [1893] 2 Q. B. 177.
(2) [1906] A. C. 428.
(3) [1914] 2 K. B. 318.
(4) [1914] 3 K. B. 135.

[PHILLIMORE L.J. I think that in *Miller* v. *Hancock* (1) the Court thought there was a trap.]

Miller v. *Hancock* (1) is an authority for the proposition that under the circumstances of the case the landlord is responsible for the repair of the staircase to all persons using it.

Sir F. Low, K.C. (*R. O. B. Lane* with him), for the defendants. In *Miller* v. *Hancock* (1) the facts as to physical control and possession had much to do with the decision. As regards the possession and control of the staircase, *Miller* v. *Hancock* (1) was different from all the other cases and from this case. That case was decided solely on the authority of *Smith* v. *London and St. Katharine Docks Co.* (2); the present case is governed by the judgment in *Lucy* v. *Bawden* (3), and there is no distinction on the facts between the two cases. Want of repair does not give a cause of action any more than want of light did in *Huggett* v. *Miers*. (4) The only duty of the landlord is not to provide an access which is in the nature of a trap.

Dunbar in reply. The evidence in the case shows the existence of a trap. There was sufficient evidence of a trap for a child of four years of age.

BUCKLEY L.J. The question we have to decide has been the subject of decisions which are binding on us and which we must follow. The difficulty to my mind is in ascertaining exactly what those decisions have determined and in applying them to the present case. The material facts are shortly as follows: The defendants let to the father of the child (the infant plaintiff in the action) who was injured one room in a house which contained four rooms; the demise was only of the room in the house. The house was approached by some steps from the street, and on either side of the steps was an area about eight feet below the steps. On either side of the steps there was a railing, and from the railing on the one side one of the rails was out. That was so when the demise was effected, and the person to whom the demise was made knew that that was the state of the railing; it was perfectly obvious to any one who used his eyes that the steps

(1) [1893] 2 Q. B. 177.
(2) (1868) L. R. 3 C. P. 326.
(3) [1914] 2 K. B. 318.
(4) [1908] 2 K. B. 278.

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were bounded by a railing and that one bar of the railings was out, and that a child, or possibly an older person, might tumble through the aperture. The child, of about three and a half years old, who was playing on the steps, fell through the aperture into the area and was injured. The action is for damages for the injury. It is based upon the alleged existence of a duty resting upon the defendant, the lessor, to repair the railing, in the performance of which he failed.

The law we have to apply seems to me to be as follows: in the case of *Cavalier* v. *Pope* (1) it was decided by the House of Lords that the owner of dilapidated premises may demise those dilapidated premises to a tenant, and if the tenant takes them and by reason of the existing dilapidations the tenant sustains injury the lessor is not liable. That is stated by Lord Loreburn C. in these words: "I can find no right of action in the wife of the tenant against the landlord either for letting the premises in a dangerous state or for failing to repair them according to his promise." In that case Lord Loreburn affirmed that there was no right of action in the wife of the tenant against the landlord for letting the premises in a dangerous state. Lord Macnaghten approved of that view. His Lordship said: "The law laid down by the Court of Common Pleas in the passage quoted by the Master of the Rolls from the judgment of Erle C.J. in *Robbins* v. *Jones* (2) is beyond question, 'a landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house; and the tenant's remedy is upon his contract, if any.'" The proposition however that, for injury resulting from the defective condition of demised dilapidated premises the lessor or the landlord is not liable, is not the proposition relevant to the present case. For the steps in question were not part of the demised premises. The question is, what is the liability of the man who demised the rooms in the house when he invited the tenants of the rooms to use these steps as a means of access to the rooms, the landlord retaining control over the steps? It is said that that control involved an obligation upon the landlord to see that the steps were kept in such a

(1) [1906] A. C. 428. (2) (1863) 15 C. B. (N.S.) 221.

condition that persons using them were not injured. Upon that point reliance was very properly and strongly placed upon a decision of this Court in *Miller* v. *Hancock* (1), which is of course binding upon us. In that case there was a building in the City in which offices were let to different tenants; there was a common staircase which was not demised to any one of the tenants, but the possession of which was in the defendant. The plaintiff was a person who properly went to call upon a tenant; and, while coming down the stairs, he fell in consequence of the worn and defective condition of one of the stairs. In that case it was held that he was entitled to recover against the lessor on the grounds which I will now state. It seems to have been held there that, in the first place, when the lessor demised to the tenant his chambers or offices, there was an implied grant of a right to use the staircase—call it an easement. Then it was said, that being so, there was an implied undertaking on the part of the landlord to maintain the staircase in a proper condition. The words of Lord Esher M.R. are: "It seems to me there is an implied obligation on the part of the landlord to the tenants to that effect," i.e., to the effect that the staircase shall afford a reasonably safe means of entrance and exit to the tenants—that there was a contractual obligation arising from the implied terms flowing from the contract of demise. What was the implied obligation? It was to maintain a proper staircase, of which the stairs should be each and all proper stairs. One was not a proper stair, and the man fell because it was an improper stair. Therefore, because it was an improper stair, the plaintiff recovered because there was a breach of the implied obligation upon the lessor to provide a proper staircase. The fact that there was a defective stair was a fact which the persons using the staircase were not bound to anticipate. The contrary was the case. By allowing a stair to be defective the lessor was exposing them to a trap. He was leading them to think there was something there which was not there. The plaintiff was trapped by something which he was not bound to anticipate, and he suffered injury. That was the basis of the decision in *Miller* v. *Hancock*. (1)

(1) [1893] 2 Q. B. 177.

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The other cases are, first, *Huggett* v. *Miers*. (1) There the facts were that separate chambers up a common staircase were let to tenants, and each tenant provided a light at the door of his chambers. The landlord was under no obligation to provide a light. At the moment when the accident happened there were no lights burning; the staircase was dark. The plaintiff, who was an employee of one of the tenants, fell and was injured. It was held that the landlord was not liable; for he was not under any obligation to light his staircase; and by not doing it he was not laying a trap for the man. The next case is *Lucy* v. *Bawden* (2), in which there was an outer stair, such as in this case; it was protected at the side by a coping eight inches high; it had no railing at all. Any one might fall over such a coping, if he did not take care. In that case the defendant was held not liable.

What seems to flow from these cases as a matter of principle is this: that the lessor, the defendant, is liable in any case in which, by way of implied grant, he enters into an implied obligation to provide something and fails to provide it. But where that is not the case and where the lessor simply offers to the tenant the right to use a particular sort of approach and the tenant accepts it, the tenant must accept the approach such as it is—say a plank with no handrail across a stream or steps protected only by a coping eight inches high. The tenant using it is not trapped in any way; he knows perfectly well that there is no handrail or railing, and he accepts the risk of using the access in the form in which it is provided. In the case we now have to decide, what was offered to the tenant was access to a room by some steps; on one side of the steps there was obviously a defective railing, a railing such as would not prevent a small child from falling into the area, if carelessly allowed to be there and no proper precautions taken to prevent its falling. The defective railing was obvious to persons using the steps; it was no trap by the lessor. Under those circumstances the case of *Miller* v. *Hancock* (3) does not decide that there was any obligation upon the defendant to any person using that access.

(1) [1908] 2 K. B. 278. (2) [1914] 2 K. B. 318.
(3) [1893] 2 Q. B. 177.

The only other point pressed is this (it is a point to which I attribute no importance): it is said that the plaintiff, or rather one of the plaintiffs, in this action is a child of three and a half years old, and is deserving of greater protection because of his tender years. I do not accede to that. If this was a dangerous place, as obviously it was, the child ought not to have been there without proper protection; and the liability of the defendant cannot be enlarged by exposing him to a liability for not providing such a railing as would prevent a child from falling into the area. I think this appeal fails.

PHILLIMORE L.J. I am of the same opinion. The case of *Cavalier* v. *Pope* (1) decided that nobody except a tenant could avail himself of the contractual right of the tenant against his landlord; nor could any other person claim in Court for an obvious defect in the premises occupied by the tenant. In *Cavalier* v. *Pope* (1) there was one point which was to a certain extent left open, and which is dwelt upon by Lord Atkinson. No case could be made there of a general common law duty of a landlord to put the premises into repair during their occupation, because, by reason of his having let a room, the right of possession had passed away from him. But in *Ryall* v. *Kidwell* (2) that very point was covered. The effect of the Housing and Town Planning Act, 1909, makes it the duty of the landlord not merely to put the premises into repair before letting them, but during the letting of premises of a particular class and occupied by poor people unable to defend themselves to keep them in repair, and by imposing the duty upon the landlord to keep the premises in repair impliedly gives the landlord the power of entry to inspect and to do all that is necessary. In that case the Court of Appeal held that an infant child standing on a chair cleaning a window—the chair slipped into a hole in the floor and the child was injured—was not entitled to recover against the landlord, the child not being the tenant, but being the daughter of the tenant. We have to reconcile those decisions, if we can, with *Miller* v. *Hancock* (3); and I think they are to

(1) [1906] A. C. 428. (2) [1914] 3 K. B. 135.
(3) [1893] 2 Q. B. 177.

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be reconciled substantially as Atkin J. reconciled them in the case of *Lucy* v. *Bawden*. (1) If you let to a tenant a room which has to be approached by steps, you impliedly let him a right of access and you let him a reasonably safe right of access, such as it appears to be. You do not let him any better right of access than that which you appear to let. If the steps have no balustrade, you are not bound to add a balustrade. If the balustrade has one long rail resting on posts at considerable intervals so that any one may slip through, the tenant takes it in that condition, and his licensees have a right to use it in the same way as the tenant. But the tenant and his licensees have a right to say to the landlord, "You have invited us to use this"; and therefore, if it is not that which it seems, the tenant or his licensee who suffers damage has a cause of action against the lessor. If it is what it seems, even though the consequence is so dangerous as crossing a river on a girder, nevertheless a licensee has no right of action against the landlord. To put the case quite simply: if these rails had been shaken and had given way by laying a hand upon them or by a man's body falling against them, this case would have been like *Miller* v. *Hancock*. (2) If there is a step, you are entitled to assume that you can safely tread upon it; and so, in the case of a balustrade, if it fails in bearing pressure, there is a trap. If a step is no wider and no less steep than it appears to be, no complaint can be made because it is no wider or shallower. So here, no complaint can be made that the rails are not closer together than they were; there was no trap, no warranty that the rails would be closer together than in fact they were; and therefore there is no cause of action.

PICKFORD L.J. I agree. The question is whether this case is governed by the case of *Miller* v. *Hancock*. (2) If this case falls within the decision in that case and is governed by it, of course that is binding upon us, and the appellants would be entitled to succeed. But it has always been observed when *Miller* v. *Hancock* (2) has been cited that that was a decision upon the facts of that particular case; I do not want to go through the cases in which that case has been cited, but I may just observe that when

(1) [1914] 2 K. B. 318. (2) [1893] 2 Q. B. 177.

dealing with that decision in *Huggett* v. *Miers* (1) Gorell Barnes P. says that the decision must be regarded as confined to the particular facts which there existed; and then he goes on to say that in such a case, as was shown by the facts in *Miller* v. *Hancock* (2), it may be that a person using the staircase might be entitled to assume that it was in a reasonably safe state of repair. That is to say, that the person with a right to use the staircase had the right to assume a proper state of repair, and that there was no trap by which he would suffer injury. In the case of *Miller* v. *Hancock* (2) there was a concealed danger; and the plaintiff was held to be entitled to recover. That case was also very carefully examined by Atkin J. in *Lucy* v. *Bawden* (3), and he came to the conclusion that, if properly examined, it did not go further than this: that there was a liability, which exists in every case, not to lay a trap or to do anything to cause a concealed danger. That being the proper conclusion established by *Miller* v. *Hancock* (2), in my opinion this case does not fall within that decision. In this case there was no want of repair of the steps; there was the absence of a rail, obvious to anybody going near the steps. Therefore I think this case does not come within the case of *Miller* v. *Hancock*. (2) With regard to the question as to the child, I entirely agree with what has been said by Buckley L.J., that his age makes no difference; and for these reasons I agree that the appeal fails.

Appeal dismissed.

Solicitor for plaintiffs: *G. Archibald Whigham.*
Solicitors for defendants: *Welman & Son.*

(1) [1908] 2 K. B. 278. (2) [1893] 2 Q. B. 177.
(3) [1914] 2 K. B. 318.

W. J. B.

C. A.
1914
Oct. 16.

[IN THE COURT OF APPEAL.]

RICKETTS *v.* THOS. TILLING, LIMITED.

Master and Servant—Negligence of Servant—Omnibus driven by Conductor in Presence of Driver.

At the end of a journey the conductor of an omnibus belonging to the defendants, in the presence of the driver, who was seated beside him, for the purpose of turning the omnibus in the right direction for the next journey, drove it through some by-streets so negligently that it mounted the foot pavement and knocked down and seriously injured the plaintiff, who was standing there. At the trial the judge, upon the authority of *Beard* v. *London General Omnibus Co.* [1900] 2 Q. B. 530, held that there was no evidence that the conductor had any authority from the defendants to drive the omnibus and entered judgment for the defendants :—

Held, that there was evidence of negligence on the part of the driver in allowing the omnibus to be negligently driven by the conductor, and that there must therefore be a new trial.

Beard v. *London General Omnibus Co.* [1900] 2 Q. B. 530 distinguished.

Application of the plaintiff for judgment or a new trial in a case tried before Atkin J. and a common jury.

The action was brought to recover damages for personal injuries suffered by the plaintiff through the alleged negligent driving of a motor omnibus belonging to the defendants. The facts were shortly as follows. On May 7, 1913, the motor omnibus had come to the end of its journey at Shoreditch at 10.30 p.m., and had discharged its passengers. The driver then gave up his seat to the conductor, who then drove the omnibus, the driver being seated by his side, round certain streets forming a triangle so as to bring it into the proper position for starting on its return journey. While being so driven, owing to the negligent driving of the conductor, the omnibus mounted the foot pavement, and knocked down a lamp-post and several persons, one of whom was killed, the plaintiff, who was one of the persons so knocked down, being severely injured. At the trial the learned judge, at the close of the plaintiff's case, held, upon the authority of *Beard* v. *London General Omnibus Co.* (1),

(1) [1900] 2 Q. B. 530.

that there was no evidence that the conductor had any authority from the defendants to drive the omnibus, and he accordingly entered judgment for the defendants. The jury, in view of a possible appeal, by agreement assessed the damages, which they placed at 50*l*. The plaintiff now applied for a judgment or a new trial.

Hemmerde, K.C. (*Tristram Beresford* with him), for the plaintiff. The decision in *Beard* v. *London General Omnibus Co.* (1) is not in point. In that case the driver had left the omnibus at a proper standing point for omnibuses and went to get his dinner. While he was away the conductor, without any authority to do so, drove the omnibus through some by-streets, apparently in order to bring it round to the place from which its next journey was to begin. Obviously the conductor had no authority to do so. In that case Vaughan Williams L.J. expressed the opinion that "where a driver and a conductor are sent out in charge of an omnibus and complaint is made of some act done by the conductor, it should be left to the jury to say whether that act so complained of was within the authority given to the conductor." In the present case the driver was negligent in allowing the conductor to drive; he was seated next the conductor, and it was for the jury to say whether the negligence of the driver was not the effective cause of the accident: *Engelhart* v. *Farrant.* (2) This case comes within *Engelhart* v. *Farrant.* (2)

[He was stopped by the Court.]

Ernest Charles, K.C. (*Jowitt* with him), for the defendants. The driver was deliberately delegating his authority to the conductor, who had no authority to drive. It is not within the scope of the driver's authority to delegate his authority to some one else: see per Lord Esher M.R. in *Gwilliam* v. *Twist.* (3)

[PICKFORD L.J. Is there any reported case in which the driver was present when the negligent driving was going on, and the master was held not to be liable?]

I know of none. But here the cause of the accident was the

(1) [1900] 2 Q. B. 530. (2) [1897] 1 Q. B. 240.
(3) [1895] 2 Q. B. 84.

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improper delegation of authority, which made it impossible for the driver to control the omnibus. The driver was not in charge of the omnibus, and his negligence was negligence outside the scope of his employment. The decision in *Beard* v. *London General Omnibus Co.* (1) has been approved in *Whitehead* v. *Reader.* (2)

BUCKLEY L.J. In this case I think there should be a new trial. The facts of the case as proved, or admitted at the trial, were these: The motor omnibus was being driven by the conductor, a person not authorized to drive. Sitting beside him on the box was the proper driver. Under those circumstances, the conductor being an inexperienced person and incompetent to drive, the motor omnibus mounted the pavement, killed a man (for which the conductor was convicted of manslaughter), and injured others. The plaintiff, who was one of those injured, brings his action against the company for damages for personal injuries. It seems to me that the driver, who was authorized to drive, had the duty to prevent another person from driving, or, if he allowed another person to drive, to see that he drove properly. He was sitting beside the conductor and the driving by the conductor was conducted in his presence. He could not delegate his authority. It is a question for the jury whether the effective cause of the accident was that the driver committed a breach of his duty (which was either to prevent another person from driving or, if he allowed him to drive, to see that he drove properly), or whether the driver had discharged that duty. The accident was due to the fact that the conductor was driving; when he was driving he met with some sudden contingency, the motor omnibus mounted the pavement, and the accident resulted. It is a question of fact for the jury what was the effective cause.

Authorities have been referred to. Strong reliance has been placed on the case of *Beard* v. *London General Omnibus Co.* (1) Let me say what, in my opinion, that case decided. The facts were that the journey of the motor omnibus had come to an end, it had arrived at the terminus of the journey at Battersea Rise.

(1) [1900] 2 Q. B. 530. (2) [1901] 2 K. B. 48.

The driver got off the box, leaving the omnibus at a place where there was a stand for two omnibuses, and went to get his dinner. The driving was for the time being altogether at an end, and, until he came back, the omnibus ought to have stopped where it was on the stand. The conductor, in that state of facts, drove the omnibus for the purpose of turning it round ready for the next journey and an accident resulted. Under those circumstances, what this Court held was that the plaintiff must produce some evidence to show that the conductor was a person authorized to drive, and it was held that the plaintiff had not discharged himself from the burden cast upon him of showing that the injury was due to the negligence of a servant of the defendants acting within the scope of his employment and that the conductor ought to have been shown to be a person who, under those circumstances, was authorized to do the act, and there was no evidence to that effect.

In *Engelhart* v. *Farrant* (1) the facts were these. A man was employed by the defendants to drive a cart by which delivery was to be made of parcels. The cart was manned by a man and a boy. The man's duty was to drive; the boy's duty was to deliver the parcels. The boy had nothing to do with the horses. The man's instructions were not to leave the cart. The driver did in fact leave the cart, and while he was absent the lad drove on and came into collision with the plaintiff's carriage and injured it. The question was whether the defendant was liable. It was held that it was a question of fact whether the original negligence was the effective cause of the damage—did the damage result from the fact that the man negligently left the cart? In his judgment Lord Esher M.R. says: "Now, for what is the defendant liable? He is liable for the negligence of Mears"—that was the driver—"if that negligence was 'an effective cause' of the subsequent damage to the plaintiff. Now, was it or was it not 'an effective cause'? In this case if there had been any doubt of its being an effective cause and the matter had been tried by a jury, the question must have been left to them." Then lower down the learned judge says: "If a stranger interferes"—with the driving, that is—"it does not

(1) [1897] 1 Q. B. 240.

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follow that the defendant is liable; but equally it does not follow that, because a stranger interferes, the defendant is not liable if the negligence of a servant of his is an effective cause of the accident." Rigby L.J. says: "I take it that the question is a question for a jury, and that we, sitting here and dealing with the finding of the county court judge as to matters of fact, ought to exercise the function of a jury." What I get from those two cases, therefore, is this: that if, as in *Beard* v. *London General Omnibus Co.* (1), the act, which was done by a person who ought not to have done it, was not done by reason of any act of negligence on the part of the person authorized to do the act, then it must be proved that the person who did the act was the agent of the master in doing it; but if the facts are that the servant was authorized to do the act and was present at the doing of it and the question arises as to whether the accident was due to his negligence in not performing his duty of driving or controlling the driving, or whether, he having discharged that duty, it arose from the negligence of the man who was driving, then that is a question for the jury.

In *Gwilliam* v. *Twist* (2) the facts were that a police constable had told a driver not to drive, thinking that the driver was drunk. The conductor was there, but he was not authorized to drive. Under those circumstances the driver and conductor authorized a bystander to drive, and while that person was driving an accident happened. The question discussed there was delegation of authority—was there a right to delegate to that stranger the right to drive the motor omnibus? That, as it seems to me, is not the question here. It is not here said that there is a liability in the master because the driver delegated to the conductor. The question is whether the driver had properly discharged his duty of not letting that other person drive while he sat by, or, if he did let him drive while he sat by, then of seeing that he drove properly. It was a question for the jury whether the accident arose from a breach by the driver of the duty which he owed to his master as driver. For these reasons I think there should be a new trial.

(1) [1900] 2 Q. B. 530. (2) [1895] 2 Q. B. 84.

PHILLIMORE L.J. I agree. The Lord Justice has stated the propositions so carefully and fully that I am rather afraid of spoiling the effect of his statements by my own, but it is desirable that each member of the Court should express some opinion in this case.

The question for the jury here was whether the negligence of the driver in letting the conductor take the wheel was the effective cause of the accident, bearing in mind, of course, what is said by Lord Esher M.R. and Lopes L.J., and I think also by Rigby L.J. in *Engelhart* v. *Farrant*. (1) I would notice one passage in the judgment of Lopes L.J. He said: "If Mears had asked a passer-by to stand at the head of the horse while he was absent, and the passer-by had left the horse, and the horse had gone on and injury had been caused to any person, the defendant would have been liable." It is not only for acts of omission but also for some acts of commission that the employer may be liable. The question here really is, Was the driver still in charge of this omnibus, and did the accident happen because he neglected his duty?

I have only to add—I did not think it desirable to bring it forward during the argument because, after all, it was only my decision as a judge of the High Court, not as a judge of the Court of Appeal but at nisi prius—that a case nearly identical with this case was tried before me at Lewes on July 7, 1911. That was a case against the Brighton and Hove Motor Omnibus Company. There the actual driver was a man in the employment of the company who at odd times used to drive one class of motor omnibus. He was standing about when the omnibus was going to be driven, I think, the last bit of its journey and he asked the driver of it to allow him to practise, and he accordingly took the wheel, the driver sitting by, and there was an accident. I left to the jury the question of whether the motor omnibus was still under the control of the driver, and, although I do not think the jury returned specific answers to the questions I put to them, they found a general verdict for the plaintiff and I gave judgment accordingly. I remember that an application was

(1) [1897] 1 Q. B. 240.

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made for a new trial because my notes were asked for, but my impression is that that application for a new trial was not proceeded with, but, if it was, it failed. (1) I agree that there must here be a new trial.

PICKFORD L.J. I am of the same opinion. I think there was evidence here which ought to have been submitted to the jury. It was admitted that the driver of this motor omnibus was alongside the man who was driving, and it is admitted that he was negligent. I entirely accept, of course, the proposition that, in order to make the owner liable, there must be negligence on the part of the person for whose acts the owner is responsible—his servant, either regularly or for that occasion only. I also, of course, accept the proposition that a man who is instructed and employed to drive ought to look after the driving of the motor omnibus and has no right to delegate that duty to anybody else. In this case I say it is admitted that the driving was negligent. It is admitted that the driver was sitting by the man who was driving and he could see all that was going on—he could control what was going on. It seems to me that the fact that he allowed somebody else to drive does not divest him of the responsibility and duty he has towards his masters to see that the omnibus is carefully, and not negligently, driven. I asked Mr. Charles whether there was any case in which the driver was there when the negligent driving went on and in which the master had been held not liable. Apparently there is not one. I have referred to the notes of the argument of the case when it was before Atkin J. and I noticed that the cases where the driver was present were referred to before him. One case was *Harris* v. *Fiat Motors* (2) and the other was *Samson* v. *Aitchison* (3), but I do not think either of those cases is any authority with regard to this case and they do not give me any guidance. But it seems to me that, where a man is entrusted with the duty of driving

(1) The reference is to *Brighton Corporation* v. *Brighton, Hove and Preston United Omnibus Company*. An application by the defendants for judgment or a new trial was made to the Court of Appeal on February 8, 1912, but was dismissed without calling on counsel for the plaintiffs —W. J. B.

(2) (1907) 23 Times L. R. 504.

(3) [1912] A. C. 844.

and controlling the driving of a motor omnibus and is sitting alongside a person who is wrongfully driving and the motor omnibus is negligently driven and thereby an accident happens, there is evidence at any rate of negligence on the part of that driver in having allowed that negligent driving. I do not at all say that on an investigation of the facts it might not appear that the act of negligence was so sudden and unexpected that he had no reason to see it; and therefore it would come back to the question of whether he was responsible for allowing the other man to drive. It seems to me at any rate that there is evidence of negligence on his part, he being there and still having the duty of the controlling and the driving of the omnibus, in allowing the omnibus to be negligently driven whereby the accident happened. I think, therefore, there was evidence to submit to the jury, and that there ought to be a new trial.

New trial ordered.

Solicitor for plaintiff: *G. Archibald Whigham.*
Solicitors for defendants: *Hicklin, Washington & Pasmore.*

W. J. B.

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Jan. 21, 22, 28.

R. LESLIE, LIMITED *v.* RELIABLE ADVERTISING AND ADDRESSING AGENCY, LIMITED.

[1914 R. 689.]

Contract—Illegality—Damages—Public Policy—Contract by Money-lenders with Letter Addressing Agency for sending out Circulars—Term of Contract that no Circular be sent to Minors—Circular negligently sent to Minor—Money-lenders fined and ordered to pay Costs—Claim by Money-lenders for Indemnity.

The plaintiffs, who were money-lenders and, as such, issued from time to time circulars to the public, employed the defendants to address and send out circulars on their behalf. No circular was to be sent to a minor. Owing to the negligence of the defendants a circular was sent to a minor, and in respect thereof the plaintiffs were convicted and fined under s. 2 of the Betting and Loans (Infants) Act, 1892, and s. 5 of the Money-lenders Act, 1900. The plaintiffs claimed to be indemnified by the defendants in respect of the fine and the costs they had had to pay:—

Held, that, as the plaintiffs had been convicted of sending the circular without having reasonable ground for believing the addressee to be of full age, the claim was not maintainable.

Colburn v. *Patmore* (1834) 1 C. M. & R. 73, and judgment of Kennedy J. in *Burrows* v. *Rhodes* [1899] 1 Q. B. 816, considered.

Further Consideration of action tried by Rowlatt J. with a jury.

The plaintiffs, who were money-lenders and, as such, issued from time to time circulars to members of the public, verbally agreed with the defendants on December 5, 1913, that the latter should delete the names of all minors from the list of names appearing in Kelly's Handbook for 1914, should address the plaintiffs' envelopes and circulars to the remaining names in the handbook, and should enclose the circulars in the envelopes ready for posting. No circular was to be addressed to any minor. That agreement was confirmed by a letter from the plaintiffs to the defendants of the same date in which, referring to the deletion of the names of minors, the plaintiffs said "You will take every precaution to see that no such person is addressed." The defendants carried out the work, but they

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addressed a circular to a minor, and in consequence the plaintiffs and their sole director, Sampson Freedman, were convicted under the Betting and Loans (Infants) Act, 1892 (1), and the Money-lenders Act, 1900 (2), and fined. In giving his decision the magistrate said: "I think that every money-lender must exercise reasonable precaution when he sends out circulars in this wholesale way, not by hundreds but by thousands, and I think the precautions he took were insufficient, and that he did not in the way he acted have reasonable ground for believing that none of these circulars would reach minors. I therefore inflict the full penalty of 20*l.* on each summons . . . . with five guineas costs on the first summons against Freedman." The plaintiffs appealed to quarter sessions against the conviction; and quarter sessions affirmed the conviction, but reduced the amount of the fines. The plaintiffs thereupon sued the defendants to recover the amount of the fines, the costs of their defence, the costs of prosecuting the appeal to quarter sessions, and the costs they were ordered to pay and had paid to the prosecution, contending that the defendants had committed a breach of the agreement, or alternatively had failed to use due diligence and care in carrying out the work entrusted to them.

The defendants denied that the damage alleged, or any damage, was caused by any default or breach of contract on their part; they contended that it would be contrary to public policy for the plaintiffs to be allowed to recover any part either of the

(1) Betting and Loans (Infants) Act, 1892 (55 & 56 Vict. c. 4), s. 2, sub-s. 1: "If any one, for the purpose of earning interest, commission, reward, or other profit, sends or causes to be sent to a person whom he knows to be an infant any circular . . . . which invites or may reasonably be implied to invite the person receiving it to borrow money . . . . he shall be guilty of a misdemeanour and shall be liable . . . , if convicted on summary conviction . . . . to a fine not exceeding twenty pounds . . . ."

(2) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 5: "Where in any proceedings under section 2 of the Betting and Loans (Infants) Act, 1892, it is proved that the person to whom the document was sent was an infant, the person charged shall be deemed to have known that the person to whom the document was sent was an infant, unless he proves that he had reasonable ground for believing the infant to be of full age."

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penalties imposed or the legal expenses incurred in respect of the prosecution and conviction; they further said that the damages were too remote, and as a separate defence they brought into Court the sum of 5*l.* with a denial of liability, and said that the same was sufficient to satisfy the plaintiffs' claim, if any.

At the trial the jury found that the defendants had been guilty of negligence.

J. B. Matthews, K.C., and *G. F. Spear*, for the plaintiffs. The gist of the offence created by the Betting and Loans (Infants) Act, 1892, and s. 5 of the Money-lenders Act, 1900, is the sending out of money-lenders' circulars to minors with knowledge: see *Director of Public Prosecutions* v. *Witkowski*. (1) In this case the plaintiffs were only notionally guilty of the offence, and as it was merely malum prohibitum, there is no principle of public policy which precludes the plaintiffs from claiming an indemnity from the defendants, whose negligence in carrying out the work entrusted to them caused the plaintiffs to be convicted. In *Burrows* v. *Rhodes* (2) the illustrations put by Kennedy J. at pp. 831—832 show that the plaintiffs' claim for an indemnity is maintainable. He there put the case of a licensed victualler being induced, by the false representation of A. that B., who gave no indication of intoxication, was sober, whereas he was in fact intoxicated to the knowledge of A., to sell drink to B., and being convicted and fined under the Licensing Acts for doing so. In such circumstances Kennedy J. considered that the licensed victualler was entitled to obtain redress from A. His second illustration is equally in point. It was this: A., contrary to the provisions of the Lunacy Act, 1845, receives into his house, which is not registered or licensed under the Act, two or more lunatics, under the belief, induced by the false and fraudulent misrepresentation of B., that these persons are not lunatics. In those circumstances Kennedy J. said he was "unable to see upon what ground of public policy or principle of justice the proprietor who has been led into the commission of the offence by the fraud of another, and who is free from any imputation of moral wrong-

(1) (1911) 104 L. T. 453 (2) [1899] 1 Q. B. 816.

doing, should be denied a right of suing for damages the person whose successful fraud has caused him to do that which the law, in its care for the health and safety of lunatics, has made an offence." Adapting the language of Kennedy J., upon what ground of public policy or principle of justice should the plaintiffs be debarred from suing the defendants, whose negligence has caused them to do that which the law, in its care for infants, has made an offence? In *W. H. Smith & Son* v. *Clinton* (1) it was held by Lord Coleridge J. that an undertaking by the defendants to indemnify the plaintiffs against claims that might be made against them in respect of any libel that might appear in a paper which was printed by the plaintiffs for the defendants was not enforceable, because, to the knowledge of the plaintiffs' staff, a libel was inserted in the paper. The contract there was manifestly illegal and opposed to public policy. Here, on the other hand, the contract was legal, and indeed was entered into for the express purpose of preventing any illegality being committed. A clause providing that a builder shall save harmless the building owner against any breach of by-laws committed during the building operations appears in every well-drawn building contract, and no Court would hesitate to enforce such a clause. There is no difference in principle between the position there and the position here. The rule laid down in *Merryweather* v. *Nixan* (2) as to there being no contribution between tortfeasors is limited to cases where the person seeking contribution or indemnity knows or must be presumed to have known that he was doing an unlawful act: see per Best C.J. in *Adamson* v. *Jarvis* (3); *Betts* v. *Gibbins* (4); *Pearson* v. *Skelton.* (5) The older case of *Fletcher* v. *Harcot* (6) is an authority to the same effect which was recognized as good law in *Betts* v. *Gibbins.* (4) In *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.* (7) it was said that *Merryweather* v. *Nixan* (2) is not founded on any principle of equity and ought not to be extended: see also *The Englishman and The Australia.* (8) The case of *Colburn* v.

(1) (1908) 99 L. T. 840.
(2) (1799) 8 T. R. 186.
(3) (1827) 4 Bing. 66, at p. 73.
(4) (1834) 2 Ad. & E. 57.
(5) (1836) 1 M. & W. 504.
(6) (1622) Hut. 55.
(7) [1894] A. C. 318.
(8) [1895] P. 212.

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Patmore (1) will doubtless be relied upon by the defendants as an authority in their favour. The actual decision in that case went upon a point of pleading, and the second part of the head-note, which is in these terms: "Semble, that the proprietor of a newspaper, convicted and fined for the publication of a libel in the paper, inserted without his knowledge and consent by the editor, cannot recover against the editor the damages sustained by such conviction," is founded upon some purely obiter observations. Furthermore, the Court in that case was not considering the position of a man innocently relying, as were the present plaintiffs, on an act being lawfully done. In any view, even if the amount of the fines is not recoverable, no consideration of public policy precludes the plaintiffs from recovering the costs to which they have been put in the police court and at quarter sessions.

The defendants plead that the damages claimed are too remote, but it is submitted that they are not: see *Mowbray* v. *Merryweather* (2) and *Scott* v. *Foley, Aikman & Co.* (3)

Sanderson, K.C., and *G. C. Rankin*, for the defendants. In *Colburn* v. *Patmore* (1) Lord Lyndhurst C.B. said: "I know of no case in which a person who has committed an act, declared by the law to be criminal, has been permitted to recover compensation against a person who has acted jointly with him in the commission of the crime"; and in *Burrows* v. *Rhodes* (4) Kennedy J. said (p. 833): "As I have already pointed out, it can never, in my judgment, be successfully contended that a claim for indemnity can be maintained where the doer of the act knew at the time, or must be presumed to know, of circumstances which make the act either a private wrong or a public crime." Those two statements cover this case. The amount of the fine is certainly not recoverable—*Fitzgerald* v. *Leonard* (5); *Crage* v. *Fry* (6)—and the costs stand in the same position. [*Cointat* v. *Myham* (7) was also referred to.]

Apart altogether from the question of public policy the

(1) 1 C. M. & R. 73.
(2) [1895] 2 Q. B. 640.
(3) (1899) 16 Times L. R. 55.
(4) [1899] 1 Q. B. 816.
(5) (1893) 32 L. R. Ir. 675.
(6) (1903) 67 J. P. 240.
(7) [1913] 2 K. B. 220.

damages claimed are too remote: see *Horne* v. *Midland Ry. Co.* (1) and *Elbinger Actien-Gesellschafft* v. *Armstrong.* (2)

J. B. Matthews, K.C., replied.

Cur. adv. vult.

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Jan. 28. ROWLATT J. read the following judgment:—This action was brought to recover the amount of fines inflicted upon the plaintiff company and its manager for an offence under the Betting and Loans (Infants) Act, 1892, as amended by s. 5 of the Money-lenders Act, 1900, together with costs of the prosecution and defence, by way of damages for a breach of contract by the defendants. The terms of the contract, which was verbal, were admitted to be accurately represented by a letter from the plaintiffs to the defendants.

By this contract the defendants undertook to address money-lenders' circulars to the persons whose names appeared in Kelly's Handbook of the Titled, Landed, and Official Classes, "taking the precaution" to omit minors. Fifteen shillings was paid in respect of the deletion of the minors from the list, and the work was done in a little over twenty hours at a cost to the defendants of 11*s*. The names to be examined were about 32,000. The name of an infant was left undeleted. A circular was sent to him, and the plaintiffs and their manager were convicted and fined.

It was contended for the plaintiffs that the contract of the defendants was absolute to omit minors and not merely to exercise care. However I left the question of care to the jury, and they found that the mistake was due to want of due care, so that in either view of the contract there was a breach. I was not asked to leave any other question to the jury.

The effect of the two statutes referred to above, stated shortly, and so far as material for the present purpose, is to make it an offence to send a money-lender's circular to an infant without reasonable ground for believing him to be of full age. The only ground the plaintiffs had for such a belief was the contract they had made with the defendants, and the magistrate held that the making of the contract above referred to did not afford them such

(1) (1873) L. R. 8 C. P. 131. (2) (1874) L. R. 9 Q. B. 473.

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reasonable ground. The position therefore is that a contract reliance upon which in sending out the circulars was a default made a crime by statute is now made the basis of an action to recover as damages compensation for the punishment in which such reliance has involved the plaintiffs and their manager.

I confess that when first I saw the nature of this action I formed and indicated a strong opinion that it was misconceived, on the broad ground that a person convicted of a criminal offence could never have the assistance of a civil Court to ease himself of the punishment by the recovery over either of the amount of any fine or costs or of damages to compensate him for any imprisonment, and that there could be no difference between cases where the Legislature had made an act or default punishable as a crime without the existence of a guilty mind and any other class of offence. This view seems to me to have been accepted by the Court of Common Pleas in *Colburn* v. *Patmore* (1), though the decision itself went on another point. The action was by a newspaper proprietor against his editor to recover damages in respect of the conviction and fining of the plaintiff for a libel inserted in the paper by the defendant, and the question which I am now discussing seems to have been mooted in the broadest form during the argument. Gurney B. at p. 80 asked whether there was any instance of an action having been brought for compensation for having been convicted of an offence. The answer was that there was not, but that the action could be maintained in that particular case because though the plaintiff by the policy of the law had been convicted the defendant was the real offender. In the argument on the other side by Mr. Maule the contention is put quite clearly and broadly that no action lies by a convicted person to exonerate himself from the consequences and that all crimes are alike in this respect. I think the Court accepted this view, for though the Lord Chief Baron speaks of the impossibility of a convicted person recovering damages against another who participated in the crime, I do not suppose he intended to indicate that the guilt of the defendant was what made the plaintiff's action fail.

In support of this view it may be said that a law which

(1) 1 C. M. & R. 73.

imposes a punishment as distinguished from a payment of compensation is defeated by the punishment being passed on to another. The object sought to be secured by such a statute in the public interest is not that so much money shall be collected by way of fine, but that a person who puts himself in such and such a position shall be punished by way of fine in order to make such persons prevent such things happening again, and I should have thought that the statute could not have its effect if the convicted person could obtain compensation in a civil Court for the punishment inflicted upon him in the criminal Court.

There are, however, authorities the other way. In *Crage* v. *Fry* (1), before Kennedy J., and in *Cointat* v. *Myham* (2), before Lord Coleridge J., plaintiffs who had been convicted under s. 47 of the Public Health (London) Act, 1891, for having unsound fish or meat for sale were allowed to recover their penalties against their vendors. In neither of those cases was the point now in question raised. It was, however, discussed in *Burrows* v. *Rhodes*. (3) In that case the plaintiff had not been convicted though he had committed an offence, and the only objection to his claim was that the damages were the consequence of his own illegal act. The learned judge held against that contention applying the rule laid down in *Adamson* v. *Jarvis* (4) and *Betts* v. *Gibbins* (5), that such objection cannot prevail where the act in itself was indifferent and the circumstances which made it illegal were not known or believed to be absent. He went on, however, to express the opinion that in cases, of which he gave two instances, where a person may be convicted as a criminal without a guilty mind he might recover damages in respect of the penalty imposed. The cases he mentioned were serving a drunken person with liquor and keeping two or more lunatics without registration or licence. Speaking of the latter case the learned judge adds this (p. 832): "I am unable to see upon what ground of public policy or principle of justice the proprietor who has been led into the commission of the offence by the fraud of another, and who is free from any imputation of moral wrong-doing,

(1) 67 J. P. 240.
(2) [1913] 2 K. B. 220.
(3) [1899] 1 Q. B. 816.
(4) 4 Bing. 66.
(5) 2 Ad. & E. 57.

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should be denied a right of suing for damages the person whose successful fraud has caused him to do that which the law, in its care for the health and safety of lunatics, has made an offence." He does not consider the question whether criminal punishments are not by their nature incapable of being the subject of indemnity and whether in saying that a person in such and such circumstances shall be punished by fine as a criminal the Legislature is not also impliedly but necessarily saying (and this too in its care for lunatics) that he shall not recover the fine over against any one else. The learned judge then refers to the express provision in the Sale of Food and Drugs Act, 1875, s. 28, enabling a convicted person in certain cases to recover penalties over, as showing that there can be no principle of public policy or justice opposed to the existence of such a right. But there is no question of such a general principle of policy. The question is as to the position created by a penal statute where such a right over is not given. With regard to *Colburn* v. *Patmore* (1) the learned judge treats the view of the Court as turning upon the circumstance that the defendant could not after the conviction be heard to say that he did not falsely and maliciously publish the libel, although in truth personally innocent of it, and he refers to a question put in the course of the argument by Alderson B. as follows: "Is it not more correct to say that the plaintiff was actually ignorant but legally cognizant?" It seems to me with great respect that that is merely another way of saying that the moral guilt or innocence of the plaintiff was immaterial inasmuch as the law treated him as a guilty person. A little further on in the course of the argument Alderson B. made this further observation: "If the law presumes the proprietor cognizant of the acts of his servants, and holds him criminally liable, must not that liability be taken with all its usual consequences?" Whether a man is said under certain circumstances to have knowledge imputed to him by the statute and to be therefore correctly indicted for doing the act knowingly, or whether he is said under the same circumstances to be guilty without regard to his knowledge so that he might be correctly indicted by alleging the fact and those circumstances

(1) 1 C. M. & R. 73.

without mentioning knowledge, seems to me a question of words. The question is not whether the conviction involves guilty knowledge but whether the fine is punitive. Punishments would appear to be of necessity strictly personal no less when they are pecuniary than when they take the form of imprisonment.

For the reasons given above, if it had not been for the views expressed by Kennedy J., I should have decided this case against the plaintiffs on much broader grounds than those I am about to set forth. It seems to me, however, that, giving the fullest effect to all that was said, or even suggested, in *Burrows* v. *Rhodes* (1), this action fails. To begin with, if Kennedy J.'s explanation of *Colburn* v. *Patmore* (2) is correct, this case is precisely within it, for the plaintiffs were convicted by virtue of s. 5 of the Money-lenders Act, 1900, of "knowingly" circularizing the infant. Secondly, if the substance is looked at, what the plaintiffs were convicted of was sending the circular without having reasonable ground for believing the addressee to be of full age. They knew what ground they had, namely, their contract with the defendants, and it was insufficient. They knew the facts which constituted the offence. It is not to the point to say that the defendants contracted to omit the minors and cannot be heard to say that the plaintiffs had not good ground for believing every recipient of the circular to be of full age. The action fails on the ground of the plaintiffs' illegal action whether the defendants do or can allege it or not.

It was contended in addition for the defendants that the damages were in any case too remote. It is not really necessary to decide this, but as it was argued I may as well say that in my judgment they were not. A possible breach of the law, if a mistake was made in the list, with resulting penalties must have been within the contemplation of the parties, and no circumstance intervened to influence the magistrate in his decision either in principle or as to the amount of the fine other than the very arrangements to which the defendants were parties.

A subsidiary point was made that even if the fine and the costs paid to the prosecution cannot be recovered the costs incurred by

(1) [1899] 1 Q. B. 816. (2) 1 C. M. & R. 73.

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the plaintiffs in defending themselves can. It seems to me that the ground on which I have decided this case clearly applies to the costs even if the broader ground on which I should have liked to decide it would not, as to which I say nothing.

In the result, the plaintiffs are entitled to nominal damages of 1*s.* for breach of contract, but as the defendants paid 5*l.* into Court the defendants are entitled to the general costs of the action and the plaintiffs would have the costs of proving the breach of contract. As I think, however, that this action ought never to have been brought and has in substance totally failed, I deprive the plaintiffs of those costs. There must be an order for the payment out of 4*l.* 19*s.* to the defendants and 1*s.* to the plaintiffs.

Judgment accordingly.

Solicitor for plaintiffs: *M. A. Jacobs.*
Solicitor for defendants: *Jesse Hoare.*

J. S. H.

C. A.

1914

Nov. 28, 30.

[IN THE COURT OF APPEAL.]

ABRAHAMS *v.* DIMMOCK.

Money-lender—Transaction harsh and unconscionable—Excessive Interest—Questions of Law or of Fact—Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 1—*County Court—Appeal—Condition Precedent—Omission to request Judge to take Note—Certificate of Judge that no Note taken—Point of Law raised by Judge—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 120.

By s. 1, sub-s. 1, of the Money-lenders Act, 1900, where proceedings are taken in any Court by a money-lender for the recovery of any money lent or the enforcement of any agreement or security made or taken in respect of money lent, and there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, or other charges are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a Court of Equity would give relief, the Court may reopen the transaction and take an

account between the parties and relieve the party sued as therein mentioned:—

Held, that the questions whether the interest is excessive and whether the transaction is harsh and unconscionable are not questions for a jury, but are for the judge.

While the jury were being sworn in an action in a county court by a money-lender to recover money lent, the county court judge raised the point that the above questions were for him to decide and not for the jury. The point was discussed before him and he eventually left the questions to the jury:—

Held, that the point of law was "raised" at the trial within the meaning of s. 120 of the County Courts Act, 1888, so as to render an appeal competent.

It is not a condition precedent under s. 120 of the County Courts Act, 1888, to a right of appeal from a county court that a request shall have been made to the county court judge to make a note of the point of law raised and of the evidence relating thereto; nor is it a condition precedent, if the judge has not made a note, that he should give a certificate to that effect. Where in such a case the judge has not made a note the Court may, under Order LIX., r. 8, determine the appeal upon such materials as it deems sufficient.

Cook v. *Gordon* (1892) 61 L. J. (Q.B.) 445 discussed.

Judgment of the Divisional Court [1914] 2 K. B. 372 affirmed.

APPEAL from the judgment of a Divisional Court reversing the decision of the judge of the county court of Bedfordshire holden at Luton; reported [1914] 2 K. B. 372.

The plaintiff, a registered money-lender, brought an action in the county court to recover 56*l.* 5*s.* on a promissory note made by the defendant and given by him to the plaintiff as security for money lent by the plaintiff to the defendant and interest thereon. The defendant claimed under s. 1 of the Money-lenders Act, 1900 (1), to reopen the transaction upon the ground that the

(1) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 1:

"(1.) Where proceedings are taken in any Court by a money-lender for the recovery of any money lent after the commencement of this Act, or the enforcement of any agreement or security made or taken after the commencement of this Act, in respect of money lent either before or after the commencement of this Act, and there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a Court of Equity would give relief, the Court may reopen the transaction, and take an account between the money-lender and the person sued, and may, notwith-

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interest charged was excessive and that the transaction itself was harsh and unconscionable. The action was tried before the county court judge and a jury. The judge left to the jury the questions whether the interest was excessive and whether the transaction was harsh and unconscionable. The jury found that the interest was excessive; that 50 per cent. would have been a reasonable rate of interest; and that the transaction was harsh and unconscionable. The county court judge thereupon reopened the transaction in question and a number of previous dealings between the parties, and, on taking the account between them, found a balance in favour of the defendant, for whom he entered judgment for the amount so found.

The Divisional Court (Ridley and Bankes JJ.) held that the questions whether the interest charged was excessive and whether the transaction was harsh and unconscionable were for the judge and not for the jury, and ordered a new trial. (1) The defendant by leave appealed.

It appeared that the county court judge was not requested to take a note of the point of law and of the facts in relation thereto, and in fact he did not take a note. What happened was as follows:—The action came on for trial on July 10, 1913, before the county court judge and a jury. It appeared from a newspaper report, which the county court judge said, as hereafter mentioned, was accurate, and from the statements of counsel that while the jury were being sworn the judge said, "What the jury are here for I do not know; the point seems to be essentially one for a judge." Thereupon counsel for the

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standing any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal, interest and charges, as the Court, having regard to the risk and all the circumstances, may adjudge to be reasonable; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise, or alter, any security given or agreement made in respect of money lent by the money-lender, and if the money-lender has parted with the security may order him to indemnify the borrower or other person sued."

(1) [1914] 2 K. B. 372.

defendant cited *Burton* v. *Companies Registration Agency* (1) and *Samuel* v. *Pazolt* (2), where Bucknill J., in the first case, and Ridley J., in the second case, left the questions whether the interest charged was excessive and whether the transaction was harsh and unconscionable to the jury. Counsel for the plaintiff, according to his recollection, referred to Matthews and Spear's Money-lenders Act, 1900, pp. 82, 83, 84. The judge thereupon said that he would allow the case to go to the jury, and he accordingly left the questions to the jury, who found as above stated. The county court judge thereupon reopened the transaction and directed an account to be taken before the registrar. A question was raised upon the accounts, and the matter came again before the judge on October 17, 1913, when he went into the accounts, and on November 13 he delivered judgment for a balance in favour of the defendant. The plaintiff appealed upon the point of law that the questions whether the interest charged was excessive and whether the transaction was harsh and unconscionable were for the judge to decide and not for the jury. The county court judge, having made no note, on January 1, 1914, gave what was called a certificate, which contained a short résumé of what happened on July 10 and October 17, no mention being made of the point of law having been raised. At the end of the certificate he said: "I may say the newspaper reports are fairly accurate, though of course somewhat condensed."

Lort-Williams and *Horace Douglas* (*Maurice Barnett* with them), for the defendant. The point of law sought to be raised by the plaintiff on the appeal to the Divisional Court, namely, that the questions whether the interest charged was excessive and whether the transaction was harsh and unconscionable were for the judge and not for the jury, was not raised at the trial in the county court. It is a condition precedent to the right of appeal from a county court under s. 120 of the County Courts Act, 1888, that the point of law should have been raised and submitted to the county court judge: *Smith* v. *Baker* (3); *Formby* v. *Formby*. (4) The point of law must be raised by one

(1) (1906) 23 Times L. R. 151.
(2) (1907) 23 Times L. R. 622.
(3) [1891] A. C. 325.
(4) [1910] W. N. 48.

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of the parties; and there must be a decision of the judge upon the point: *Chapman* v. *Withers*. (1) [*Clarkson* v. *Musgrave* (2) was also referred to.]

Further, it is a condition precedent to the right of appeal from a county court that the appellant should have requested the judge to make a note of the point of law raised and of the facts in evidence in relation thereto: *Cook* v. *Gordon*. (3) No such request was made to the county court judge in this case, and the judge did not take a note. *Seymour* v. *Coulson* (4) is distinguishable because there the county court judge had taken a note, and Brett L.J. (at p. 365) said that "we are not called upon to decide what may be the effect in a case where no note has been taken, and no request has been made to the judge to take it . . . . because in the present case the judge has sent a full note with a statement of the points of law." Cotton L.J. (at p. 366) and Thesiger L.J. (at p. 367) intimated the same reservation. Moreover that case was decided before the County Courts Act, 1888. The decision in *Wohlgemuthe* v. *Coste* (5) may seem to be in conflict with *Cook* v. *Gordon* (3), but it would seem that in that case the county court judge had taken a note.

Next, if there is no note of the county court judge, it is a condition precedent to the hearing of the appeal that a certificate of the judge should be produced that no note had been taken: *Brown* v. *Book*. (6)

[*Great Eastern Ry. Co.* v. *Giddons* (7), *Lumb* v. *Teal* (8), *Reg.* v. *Kerr* (9), and *Huddleston* v. *Furness Ry. Co.* (10) were also referred to.]

[The COURT said that, in the absence of a note by the judge, they would, under Order LIX., r. 8, of the Rules of the Supreme Court, 1883, allow a newspaper report to be referred to, the county court judge having given a certificate or memorandum stating that the report was fairly accurate.]

Upon the main point, the questions whether the interest

(1) (1887) 58 L. T. 24.
(2) (1882) 9 Q. B. D. 386, at p. 391.
(3) 61 L. J. (Q.B.) 445.
(4) (1880) 5 Q. B. D. 359.
(5) [1899] 1 Q. B. 501.
(6) (1892) 8 Times L. R. 227.
(7) (1880) 44 J. P. 284.
(8) (1889) 22 Q. B. D. 675.
(9) (1894) 70 L. T. 595.
(10) (1899) 43 Sol. J. 295.

charged was excessive and whether the transaction was harsh and unconscionable were questions for the jury and not for the judge. In *Burton* v. *Companies Registration Agency* (1) Bucknill J. left these questions to the jury, and on appeal (2) the Court of Appeal expressed no opinion upon the point. In *Samuel* v. *Pazolt* (3) Ridley J. followed the decision of Bucknill J. It is admitted that the question whether the transaction "is otherwise such that a Court of Equity would give relief" is for the judge and not for the jury. The learned judges in the Divisional Court said that the words "the Court" are used all through s. 1 as meaning the judge, but the opening words of the section, "where proceedings are taken in any Court," show that "Court" is used in the section in a different sense. The authors of Matthews and Spear on the Money-lenders Act, 1900, at p. 84, suggest an analogy between the position of a judge and jury in this case and their position in cases of covenants in restraint of trade, and also in cases of malicious prosecution where the question of reasonable and probable cause is for the judge after the jury have found any disputed facts. That suggestion ought not to be adopted. The question whether a covenant in restraint of trade is void is a question of public policy, which is not a question for a jury: *Tallis* v. *Tallis* (4); *Dowden & Pook* v. *Pook* (5); and in *Lister* v. *Perryman* (6) Lord Hatherley L.C., Lord Westbury, and Lord Colonsay expressed their regret that the question of reasonable and probable cause was for the judge and not for the jury. Under the old usury laws the question whether an allowance of commission accompanying a loan of interest exceeds a fair and reasonable compensation for the trouble of the lender is for the jury to decide: Comyns' Digest, 5th ed., vol. vii., tit. Usury, p. 609, citing *Carstairs* v. *Stein*. (7) The policy of the Money-lenders Act, 1900, is to prevent oppression, and to ensure that the transaction is consistent with fair dealing: *Samuel* v. *Newbold*. (8) Those are questions peculiarly fit for a

(1) 23 Times L. R. 151.
(2) (1907) 23 Times L. R. 337.
(3) 23 Times L. R. 622.
(4) (1853) 1 E. & B. 391, at p. 413.
(5) [1904] 1 K. B. 45, at p. 54.
(6) (1870) L. R. 4 H. L. 521, at pp. 531, 538, 539.
(7) (1815) 4 M. & S. 192.
(8) [1906] A. C. 461, at pp. 467, 470, 477.

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jury to decide. That case shows that the words "harsh and unconscionable" are not used in any technical sense, but are expressions of common sense within the special province of a jury. The Act does not define "Court," and if there is a jury it includes the jury, and then the judge and jury must exercise respectively their own special functions. The decision of the Divisional Court was therefore wrong.

[They further contended that the statement of Ridley J. (1) that "the judge has taken the account on the wrong basis, namely, by appropriating all repayments made to principal until the amount repaid equals the principal sum lent, and then, and not till then, applying repayments to interest," was wrong, and that the county court judge had adopted the right course. *Parr's Banking Co.* v. *Yates* (2) was referred to.]

J. B. Matthews, K.C., and *J. F. Eales*, for the plaintiff, were not called upon.

BUCKLEY L.J. In this case a money-lender sued in the county court for an amount which he alleged was due to him, and the action was set down for trial with a jury. The defendant raised the contention under the Money-lenders Act, 1900, that the rate of interest charged was excessive and that the transaction was harsh and unconscionable. The judge left those two questions to the jury under the circumstances which I will state presently. The jury found that the rate of interest was excessive and that the transaction was harsh and unconscionable, and they found that 50 per cent. was a reasonable rate of interest. The registrar was thereupon directed to take the accounts upon that basis. A question was raised upon the accounts, and the matter came again before the judge, and ultimately he found a balance due from the plaintiff to the defendant, and judgment was accordingly given in favour of the defendant. The Divisional Court granted a new trial upon the ground that the two questions whether the rate of interest was excessive and whether the transaction was harsh and unconscionable were questions not of fact for the jury but of law for the judge. From that decision an appeal is brought to this Court.

(1) [1914] 2 K. B. at p. 375. (2) [1898] 2 Q. B. 460.

Four points have been raised with which I propose to deal. The fourth is the important one, but the others ought not to be passed over. It is said, and said truly, that we have no note by the county court judge. He has given what is called a certificate, which is merely a short résumé of the proceedings before him, and from that certificate I get these dates: he tried the action with a jury on July 10, 1913; it then came before him on October 17, 1913, on the question of the accounts which had been before the registrar, and it appears by a newspaper report which is before us that he delivered a reserved judgment on November 13, 1913. The so-called certificate is dated January 1, 1914, so that the learned judge was at the last mentioned date endeavouring to state to the best of his recollection matters which had taken place before him some months previously. It is contended that the party appealing from a county court must, where no note is forthcoming, obtain a certificate from the county court judge that he has no note; that nothing else will do. I do not think that *Brown* v. *Book* (1), which was cited in support of that proposition, is an authority for it, and if it were it would be wrong. No doubt the best evidence that there is no note is that the judge himself or his officer for him has so stated. I have no doubt that the Court in *Brown* v. *Book* (1) exercised a wise discretion in saying that, inasmuch as they were not satisfied that there was no note, they would ask the appellant before they heard the appeal to get a certificate from the judge that there was no note. Order LIX., r. 8, of the Rules of the Supreme Court, 1883, provides that "on any motion by way of appeal from an inferior Court, the Court to which any such appeal may be brought shall have power, if the notes of the judge of such inferior Court are not produced, to hear and determine such appeal upon any other evidence or statement of what occurred before such judge which the Court may deem sufficient." The rule contemplates that the appeal may proceed in the absence of a note by the county court judge; it is for the Court in each case to say whether it is satisfied that it cannot get the best evidence of what took place, namely, the judge's note. In the present case I am satisfied that there is no note. The county court judge

(1) 8 Times L. R. 227.

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in his certificate, as it is called, says that the newspaper reports are fairly accurate, though somewhat condensed. In these circumstances we have allowed a report in a local newspaper to be used as to what took place before the learned judge. We have therefore no note of the county court judge, but we are satisfied that we have before us in the circumstances the best materials we can obtain for ascertaining what took place before him, and we proceed to act upon them.

The next point is this. It is said that no request was made to the judge to take a note, and that such a request is a condition precedent to the appeal being heard. In my opinion that contention is wrong. I need hardly say that there ought to be a request to the judge to take a note so that the question of law and the evidence which raises it may appear upon his note, and that the appeal may proceed in the regular way. The matter depends upon s. 120 of the County Courts Act, 1888, which gives the right of appeal. The concluding words of the section are: "At the trial or hearing of any action or matter, in which there is a right of appeal, the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the action or matter." The party therefore ought to make a request and the judge upon the request being made ought to take a note, but the section does not say, and there is no statutory provision which says, that the absence of a request or the absence of a note shall preclude the right of appeal. In my opinion the case of *Cook* v. *Gordon* (1) was wrongly decided. This point fails.

The third point is that the question of law was not "raised" before the county court judge within the meaning of s. 120 of the Act, and that this Court cannot adjudicate upon a point of law which was not raised before the county court judge. What happened, as I understand, before the county court judge was this. The action was set down for trial before the judge and a jury. The jury were in course of being sworn when the learned judge said to counsel, "What the jury are here for I do not know; the point seems to be essentially one for a

(1) 61 L. J. (Q.B.) 445.

judge." He was himself taking the point that the questions as to the rate of interest being excessive and the transaction being harsh and unconscionable were for the judge and not for the jury, and that those were the only questions he had to try. Thereupon an argument took place before him upon the point, and Mr. Eales, according to his recollection, referred to Matthews and Spear's Money-lenders Act, 1900, pp. 82, 83, 84, and Mr. Lort-Williams referred to the cases of *Burton* v. *Companies Registration Agency* (1) and *Samuel* v. *Pazolt.* (2) Upon the statement on each side it is clear that the point was raised by the judge that the questions were for him and not for the jury; attention was called to the two cases which showed that it was for the jury and not for the judge, and in the result the learned judge proceeded to hear the case with the jury. In my opinion, that was a complete raising of the point and a decision of the judge upon it in this sense, that the judge himself took the point, heard what was to be said upon it, and ultimately proceeded to hear the case with the jury upon the contrary view to that which he had first expressed. The question of law was therefore raised before the judge, and this point also fails.

There remains the fourth point, namely, that arising upon the construction of the Money-lenders Act, 1900, which is the main point to be determined. Sect. 1, sub-s. 1, of the Act enacts that upon being satisfied of the existence of certain matters the Court may reopen the transaction and adjudge in manner therein provided. The matters mentioned are four in number. The sub-section provides that where proceedings are taken in any Court by a money-lender to recover money lent and there is evidence which satisfies the Court (*a*) that the interest charged in respect of the sum actually lent is excessive, or (*b*) that the amounts charged for expenses, &c., are excessive, and that in either case (*a*) or (*b*) it is shown (*c*) that the transaction is harsh and unconscionable or (*d*) that it is otherwise such that a Court of Equity would give relief, the Court may reopen the transaction. The question for decision upon that is what does "the Court" mean. "The Court" must be satisfied of either (*a*) or (*b*), and it must further be satisfied that in one of those cases either

(1) 23 Times L. R. 151. (2) 23 Times L. R. 622.

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(*c*) or (*d*) is true. (*d*) is this: "is otherwise such that a Court of Equity would give relief." He would be a bold man who would say that that could be a question for a jury. It is obvious that if the case made is that either (*a*) or (*b*) has happened and that (*d*) has happened the case cannot be for the jury, but must be for the judge. If "the Court" has that meaning in that hypothetical state of facts, why should it mean something different in another state of facts, namely, if either (*a*) or (*b*) has happened and (*c*) has happened? Further, what has to be shown under (*a*) or (*b*) is that something is excessive. What "excessive" means in the statute is a question of construction for the judge. The jury may be asked to find any facts which the judge may think necessary for his decision of the question of law, as, for instance, what the borrower's means were, what was his capacity to repay, what his necessities were, what was the security offered, and the like. When the judge has had their assistance in ascertaining any disputed facts it is for him to say whether the interest or the amount charged for expenses, &c., is "excessive" within the meaning of the section. The same is true of the words "harsh and unconscionable." I see no distinction between the two cases, the one where the question turns upon the word "excessive," and the other where it turns upon the words "harsh and unconscionable." In each the judge may and ought, if a jury is there, to obtain from them a finding upon such questions of fact as may lead to the determination of the question of law which he must then determine himself, namely, whether the interest or the amount charged for expenses is excessive and whether the transaction is harsh and unconscionable.

The Divisional Court were therefore right in holding that these questions were for the judge and in ordering a new trial.

There is one other matter. Mr. Lort-Williams complained that something was said in the Divisional Court upon the question of the accounts—with which we have on this appeal nothing to do—which is wrong and which may prejudice him when the case is tried again. I do not find that the learned judges in the Divisional Court said anything wrong. The sentence which is complained of is in the judgment of Ridley J. (1):

(1) [1914] 2 K. B. at p. 375.

"It is argued, and I think rightly, that the judge has taken the account on the wrong basis, namely, by appropriating all repayment made to principal until the amount repaid equals the principal sum lent, and then, and not till then, applying repayments to interest." In my opinion that observation is perfectly correct. If, for instance, at any particular moment there was 30*l.* due for principal and 10*l.* for interest, and the borrower paid 20*l.* to the lender and did not appropriate it in any way when he made the payment, the lender would be entitled to appropriate it in the way most to his benefit, and he would naturally appropriate it first in payment of the interest due, and then in reduction of principal. It was suggested that that would lead to compound interest. It does nothing of the sort. No one suggests that the lender has any right to compound interest. The effect is that by appropriating in that way a larger amount of the principal is left undischarged than if it had all been appropriated to principal, and there is thus left a larger sum bearing simple interest. That is quite right. I see nothing erroneous in what the learned judges in the Divisional Court have said.

The appeal must be dismissed.

PHILLIMORE L.J. I am of the same opinion. The old mode of appealing from a county court was by special case. The County Courts Act, 1875 (38 & 39 Vict. c. 50), s. 6, provided a new mode of appeal by motion to the Court in any case in which a party has a right of appeal, that is to say, upon a point of law which has been raised in the county court. Sect. 120 of the County Courts Act, 1888, which codified the law, enacts that "if any party in any action or matter shall be dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved . . . . may appeal from the same to the High Court in such manner and subject to such conditions as may be for the time being provided by the Rules of the Supreme Court." Then the last sentence in the section reads: "At the trial or hearing of any action or matter, in which there is a right of appeal, the judge, at the request of either party, shall make a note of any

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question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the action or matter." There is nothing said expressly in that section about any condition precedent to the right of appeal, but under not dissimilar words in s. 6 of the County Courts Act, 1875, it was held that it was a condition precedent that the question of law should have been raised before the county court judge; and the same view has been taken by the Courts under s. 120 of the Act of 1888. Though there have been one or two decisions in the Divisional Court which indicated a leaning towards holding that there exists a further condition precedent, and although possibly one of the cases may have gone so far as to say that there is a further condition precedent, this Court has not so held, and the case of *Seymour* v. *Coulson* (1) is, in my view, a distinct authority that there is no other condition precedent. It is not a condition precedent either that the judge should make a note, or—as *Seymour* v. *Coulson* (1) decided—that he should be requested to make a note. No doubt in *Seymour* v. *Coulson* (1) a note had been taken by the county court judge, but the objection was expressly taken that no request had been made to him to make a note, and that this was a condition precedent to the right of appeal; and this was overruled. It is a condition precedent that the point should be raised in the county court. I put it in that form because I do not say that the plaintiff or the defendant must raise it; the point must be raised and determined by the judge. If the point has been raised and determined, there ought to be a note; and if the judge has not been asked to take a note the appellant may be in considerable difficulty by reason of his omission to make the request; but he is not thereby precluded from appealing. If the Divisional Court can arrive aliunde at what took place before the county court judge, it is at liberty to do so, and, in view of the fact that a large amount of small litigation is conducted in the county court, and that most of it goes no further, the Rules of the Supreme Court, which are referred to in s. 120 of the Act as regulating the procedure on appeals, contain a special provision in Order LIX., r. 8, for cases where the judge of an inferior Court

(1) 5 Q. B. D. 359.

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has not taken a note or has not taken an adequate note. In such a case the Court may "hear and determine such appeal upon any other evidence or statement of what occurred before such judge which the Court may deem sufficient." There is a passage in the judgment of Thesiger L.J. in *Seymour* v. *Coulson* (1) which it is worth while repeating, because it refers to a practice which, though now obsolete, has some bearing upon the kind of evidence which a Court will require. He compared the application, which was then by motion, to a motion ex parte for a new trial in the High Court. "Prima facie he would be entitled to move as in ordinary cases in the High Court upon counsel's briefs and notes and the ordinary materials used upon such motions; but the Legislature probably thought it advisable to provide for those cases in which there might be contradictions as to the questions raised or the evidence given before the county court judge, and in order that the Court might have an accurate note of the questions and evidence provided that the party intending to dispute his decision might request the judge to take a note of the evidence and of his determination thereon." That gives an idea, from the practice at the date when *Seymour* v. *Coulson* (2) was decided, as to the kind of materials which the Court may be satisfied to accept on these appeals instead of the judge's notes. It is most desirable that there should be a note, and it is within the discretion of the Divisional Court to refuse to hear an appeal for some good reason if it is satisfied that there is no note and that no request for a note was made, or it may hear and determine the appeal on any evidence or statement which it deems sufficient. I have known cases heard in the Divisional Court entirely on the admissions of counsel as to what took place in the Court below. The Divisional Court therefore were not precluded from hearing this appeal by reason of the fact that no request was made to the county court judge to take a note, nor by reason of that fact combined with the fact that there is no note.

The only materials which we have before us arise in a remarkable manner, but the case is a peculiar one. There being no note, the learned judge gave what is called a certificate or memorandum, in which he gives a kind of historical account of

(1) 5 Q. B. D. at p. 367. (2) 5 Q. B. D. 359.

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what happened at the trial, and in order to inform the Court further as to what happened before him, he says in his certificate that the newspaper reports are fairly accurate though somewhat condensed. We have therefore been obliged to ascertain as best we could what took place at the trial, and after having looked at the newspaper report referred to by the learned judge, and having heard what both counsel have very properly and fairly said with regard to their recollection upon the matter, we have come to the same conclusion as the Divisional Court, namely, that the point of law that the questions whether the interest charged was excessive and whether the transaction was harsh and unconscionable were for the judge and not for the jury was raised at the trial, and having been raised was determined by the judge. The county court judge, finding that two judges of the High Court in *Burton* v. *Companies Registration Agency* (1) and *Samuel* v. *Pazolt* (2) had taken the view that these questions were for the jury, simply followed those decisions, though very possibly he did not himself take the same view. The point was therefore raised before him and it was open in the Divisional Court and is open here.

That brings me to the main point which we have to decide. I agree with what Buckley L.J. has said upon it. It is for "the Court" to determine whether the interest charged is excessive or the amounts charged for expenses, inquiries, fines, &c., are excessive, and whether in either case the transaction is harsh and unconscionable, or is otherwise such that a Court of Equity would give relief. For this purpose "the Court" must mean the judge. If there is a jury, whether the action is in the High Court or in the county court, the judge may, whenever there is any controverted question of fact, get any assistance he can from the jury, but he must ultimately decide for himself whether the interest charged is excessive or the expenses are excessive and whether, if this be the other condition, the transaction is harsh and unconscionable.

The analogy of actions for malicious prosecution and the way in which a judge determines whether there is an absence of reasonable and probable cause is a very useful analogy to follow. There are various ways in which the judge can get assistance

(1) 23 Times L. R. 151. (2) 23 Times L. R. 622.

from the jury. I do not lay down what particular course he should take in any particular case. It is enough to say that he cannot relieve himself from the duty of deciding whether the interest is excessive and the transaction harsh and unconscionable. In the present case the county court judge has given no decision upon these matters. He submitted them to the jury and took their verdict upon them; and what he subsequently did was merely to work out that verdict and take the accounts upon the basis of the rate of interest which the jury found to be reasonable. In my opinion the Divisional Court were right in holding that the judge must first decide those questions himself, and upon that basis he must take the accounts. The case must therefore go down for a new trial.

With regard to the account which was taken, we have not heard fully Mr. Lort-Williams' complaint as to the view taken by the Divisional Court upon that matter. We have not looked closely into the account taken by the learned judge, which now disappears because the basis for any account has gone. But if the account was taken on the basis stated by Ridley J. (1), I think, with Buckley L.J., that the observation made upon it by that learned judge is right. Whether he has properly stated the basis upon which the account was taken is another matter. Most probably he has, but I give no decision upon it. Ridley J. says in effect that the account was not rightly taken because the county court judge appropriated all repayments made first to principal and not to interest, as he ought to have done; and that if an account is taken in that way the principal will all be paid off and not the interest. I think Bankes J. took the same view when he said (2) that the judge took the account upon the wrong basis. If the account was taken in that way,—I do not say it was, because we have not had the account fully examined—I agree that it was taken on the wrong basis. It is agreed that the plaintiff is not entitled to charge compound interest, and if it should turn out that the transaction has to be reopened and an account taken between the parties, the account will have to be taken upon the footing that no compound interest is chargeable. The appeal must be dismissed.

(1) [1914] 2 K. B. at p. 375. (2) Ibid. at p. 377.

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PICKFORD L.J. I am of the same opinion. It seems to me that the preliminary points have all been decided long ago and are covered by authority. The points are that a request must be made to the judge to take a note; that there must be a note taken or a certificate by the judge that there is no note, and that if there is no such certificate the Court cannot look at other materials under Order LIX., r. 8; and that the point of law must have been raised in the county court. All those matters seem to me to be covered by authority. The request to take a note is not a condition precedent to a right of appeal. It is true that Wills J. in *Cook* v. *Gordon* (1) used an expression which might lend some colour to the other view. If he meant that it was in the ordinary sense of the words a condition precedent to an appeal, I think he was wrong. Looking, however, at the whole case, I have some doubt whether, though he used the words, he meant to say that. There certainly were materials in that case on which the Court might very well have refused to allow any substitute for a note, because upon the materials there the Court was not satisfied that there was not a note. *Cook* v. *Gordon* (1) is spoken of in the Annual Practice, 1915, p. 1162, as having been overruled by *Wohlgemuthe* v. *Coste*. (2) Technically it could not have been overruled by that case, as it was a decision of a Court of co-ordinate jurisdiction. There is no doubt, however, that the reasoning in *Wohlgemuthe* v. *Coste* (2) is contrary to the reasoning in *Cook* v. *Gordon*. (1) It is also spoken of as being opposed to *McGrah* v. *Cartwright* (3); and in my opinion, if it means that a request to take a note is a condition precedent to the right to appeal, it is wrong.

Nor do I think that a certificate by the judge that he has not taken a note is a condition precedent. It is quite clear that the point of law which is intended to be raised on the appeal must have been taken before the county court judge; otherwise it cannot be taken on appeal. It must have been taken in a way that will bring it to the notice of the judge and give him an opportunity of deciding it. In this case there has been considerable question as to whether the point was taken, and I must say

(1) 61 L. J. (Q.B.) 445. (2) [1899] 1 Q. B. 501.
(3) (1889) 23 Q. B. D. 3.

that the case comes before us in a very unfortunate way. The judge took no note. It was a case which obviously might present difficulties, and I should have thought that it would have been better if a note had been taken, whether a request was made or not. He did, however, some months afterwards give a certificate which purports to be a history of what had taken place, and it is argued that that must be taken as his note, and that if it did not state that the point was raised it must be taken that it was not. The answer to that seems to me to be quite clear. The certificate is not a note. It is probably the best substitute for a note which the judge can give us after so many months. It is true that the county court judge does not say a word about the point being raised that the questions whether the interest was excessive and whether the transaction was harsh and unconscionable were for the judge and not for the jury. It is clear, however, from the admissions of counsel that the point was raised. It is agreed by counsel that the county court judge himself took the point. It was taken before the jury were sworn, the learned judge saying, "What the jury are here for I do not know; the point seems to be essentially one for a judge." Thereupon counsel for the defendant cited two cases in which High Court judges had held that those questions were for the jury. In consequence of those two decisions the learned judge submitted the questions to the jury, although his first inclination was that they were questions for him to decide. In these circumstances it can hardly be said that the point was not brought before the judge's mind. It was his mind that originated the point, and it was discussed and decided. That being so, it would be necessary, in order to prevent a party from taking advantage of it, to show that he had in some way abandoned or waived it, or that by his conduct he had become disentitled to rely upon it. I see no evidence of that here. Therefore I think that the Divisional Court could and we can entertain the appeal, though I cannot help feeling that it is extremely unsatisfactory that there is no proper record of what took place at the trial.

With regard to the main point I agree with what has been said by the other members of the Court. Sect. 1, sub-s. 1, of the Money-lenders Act, 1900, upon its true construction shows

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that these are matters to be decided by the judge. At the same time there is nothing to preclude him from having the assistance of the jury upon any questions of fact which he may think necessary to enable him to determine the question of law. The analogy of the action for malicious prosecution seems to me to be a somewhat close one, and the function of the jury in this case to be very much the same as the function of the jury in that case. The opinion is expressed in Matthews and Spear on the Money-lenders Act, 1900, pp. 83, 84, that the question of the interest being excessive within s. 1, sub-s. 1, of the Act is for the jury. I cannot agree. It is for the judge. So also in my opinion the question whether the charges are excessive is for the judge. That, however, does not necessarily preclude the judge from leaving questions to the jury with regard to the interest and the charges, the answers to which may help him to form his own opinion as to whether or not the transaction comes within the section.

With regard to the account, all that the learned judges in the Divisional Court said was that payments must be credited to interest before they are credited to principal. That seems to me to be right. I quite agree that the account must be taken on such a basis as to exclude any charge of compound interest against the defendant, but I see nothing in what the Divisional Court said that gives any colour to the fear that compound interest may be charged. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Windybank, Samuell & Lawrence.*
Solicitor for defendant: *W. Bloomer.*

W. F. B.

MATSOUKIS *v.* PRIESTMAN & CO.

[1914 M. 1495.]

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Feb. 2, 3.

Contract—Agreement to build Steamship—Delivery to be within Specified Time—Exceptions Clause—Delay in Delivery—Force majeure—Indirect Effects of Coal Strike—Breakdown of Machinery—Bad Weather.

By a contract in writing dated February 21, 1912, the defendants agreed to build a steamer for, and deliver her to, the plaintiff on or before February 28, 1913. The contract contained the following exceptions clause:—"If the said steamer is not delivered entirely ready to purchaser at the above-mentioned time, the builders hereby agree to pay to the purchaser for liquidated damages, and not by way of penalty, the sum of 10*l.* sterling for each day of delay and in deduction of the price stipulated in this contract, being excepted only the cause of force majeure, and/or strikes of workmen of the building yard where the vessel is being built, or the workshops where the machinery is being made, or at the works where steel is being manufactured for the steamer, or any works of any sub-contractor."

As a result of the universal coal strike of 1912 the works from which the defendants obtained their materials for other ships they were building got behindhand; the ship in turn to be built before the plaintiff's occupied the berth that was intended to be occupied by the plaintiff's much longer than otherwise she would have done, and consequently the plaintiff's steamer was late in being laid down. The steamer having been delivered after the contract date, the plaintiff claimed damages:—

Held, that the general dislocation of the business of the defendants and of those from whom they obtained materials operating indirectly on the completion of the plaintiff's steamer, by preventing the completion of the vessel prior in turn, constituted a case of force majeure within the meaning of the exceptions clause and therefore excused the defendants in respect of the delay so caused.

Held, further, that delay due to breakdown of machinery was, but that delay due to bad weather was not, covered by the exception of force majeure.

Action tried in the Commercial Court by Bailhache J.

By an agreement in writing dated February 21, 1912, made between the plaintiff and the defendants, the defendants agreed to build a steamer for, and to deliver her to, the plaintiff on or before February 28, 1913. The agreement, which was not the defendants' usual form of contract, but was that which the plaintiff, who was a Roumanian, put forward, contained the

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following clause:—"If the said steamer is not delivered entirely ready to purchaser at the above-mentioned time, the builders hereby agree to pay to the purchaser for liquidated damages, and not by way of penalty, the sum of 10*l.* sterling for each day of delay and in deduction of the price stipulated in this contract, being excepted only the cause of force majeure, and/or strikes of workmen of the building yard where the vessel is being built, or the workshops where the machinery is being made, or at the works where steel is being manufactured for the steamer, or any works of any sub-contractor."

The steamer was not in fact delivered till August 22, 1913, and the plaintiff, in order to get delivery, paid, under protest, the full price without deduction in respect of the delay, and he now claimed as damages, or as money had and received by the defendants to his use, 1750*l.*, being 10*l.* a day for every day's delay in delivery after February 28, 1913.

Owing to the coal strike of 1912, which began on March 1 and ended on April 8 of that year, there was a general dislocation of the business of the defendants and of those from whom they obtained materials for the ships in turn to be built before the plaintiff's, the steamer immediately in turn to be built before the plaintiff's occupied the berth much longer than she otherwise would have done, and consequently the plaintiff's steamer was late in being laid down. The delay due to this cause was, according to the finding of the jury, seventy days. There was a further delay of five days due to breakdown of machinery, and of two days due to a shipwrights' strike. Delay was also caused by bad weather, the absence of the defendants' men in attending football matches, and in attending the funeral of the shipyard manager, and in respect of the delay attributable to these various causes the defendants claimed to be excused by the exceptions clause in the contract.

A. A. Hudson, K.C., and *C. Robertson Dunlop*, for the plaintiff.

Roche, K.C., and *Lewis Noad*, for the defendants. The dislocation of the defendants' business and the consequent delay occasioned in the completion of the steamship in course of

construction prior to the plaintiff's amounted to force majeure within the exceptions clause. In *In re Lockie & Craggs* (1) delay during the building of the vessel prior in turn to the one in question was held to be a "circumstance beyond the builders' control" and the builders were therefore entitled to an allowance in respect thereof. In *Yrazu* v. *Astral Shipping Co.* (2) a clause in a contract for the carriage by sea of live stock provided that the vessel should not call at any port before landing her live stock "except in case of force majeure." Owing to a miscalculation of the master and engineer the steamer left the loading port with insufficient coal and had to put into another port for more coal. Walton J. held that there was in those circumstances no case of force majeure, but he added that if the deficiency of coals "had arisen from some accident, if, for example, it had been necessary to jettison coals, I think that it would have been a case of force majeure within the meaning of the clause." Walton J. clearly regarded force majeure as anything which was beyond the shipowners' control. In this case the strike, operating in the way that it did, was beyond the defendants' control and was a case of force majeure so as to excuse the defendants to the extent of the seventy days found by the jury. The delay caused by the breakdown of machinery is also covered by the words force majeure; so also is that due to bad weather and the absence of the defendants' men at football matches and the funeral of the shipyard manager inasmuch as that delay was beyond the defendants' control. The delay due to the shipwrights' strike comes within the other words of the exceptions clause.

A. A. Hudson, K.C., in reply, was only called on as to the effect of the coal strike and breakdown of machinery. The words force majeure cannot cover a strike. The words are simply the French rendering of the Latin words vis major, which have the same meaning as the term act of God in English law: see *Nichols* v. *Marsland.* (3) An "act of God" was said in *Nugent* v. *Smith* (4) to be an accident due to natural causes directly and exclusively, without human intervention, and

(1) (1901) 7 Com. Cas. 7.
(2) (1904) 9 Com. Cas. 100.
(3) (1876) 2 Ex. D. 1.
(4) (1876) 1 C. P. D. 423.

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which could not have been prevented by any reasonable amount of foresight and care. It cannot be said that a strike is an "accident."

[BAILHACHE J. A strike was said to be an "accident" by Willes J. in *Fenwick* v. *Schmalz*. (1)]

That was because of the particular words of the contract under consideration, the words being "riots, strikes, or any other accidents." Even, however, if it could be said that the term "force majeure" might cover a strike, it cannot do so in this case, seeing that in the same clause provision is made with reference to certain specified strikes. The result of holding that force majeure covers a strike would be to read into the clause a particular strike in addition to those specifically enumerated. If it had been intended to excuse delay due to a miners' strike it would have been easy to have done so in terms, particularly as it was known at the date when the contract was entered into that such a strike was not improbable.

Breakdown of machinery does not come within the words "force majeure." A breakdown of machinery is a usual occurrence and must have been taken into account by the defendants in considering the length of time they would require for the building of the steamer.

BAILHACHE J. The plaintiff, who is a Roumanian, sues the defendants, who carry on business in this country, on a contract, dated February 21, 1912, by which the defendants agreed to build a steamship for the plaintiff. The action, which arises out of the late delivery of the vessel, was tried before me with a jury to whom was left one question of fact, namely, assuming that the defendants were entitled to an allowance for delay indirectly occasioned by the great coal strike which began on March 1, 1912, and ended on April 8, 1912, how much time were they to be allowed? The jury found that in respect of this the defendants would be entitled to an allowance of seventy days. The delivery of the vessel was in fact delayed to the extent of 175 days, and deducting therefrom the seventy days found by

(1) (1868) L. R. 3 C. P. 313.

the jury as attributable to the effects of the coal strike there are left 105 days for which the defendants would be liable to the plaintiff but for the fact that they are entitled to an allowance of seven days in respect of a shipwrights' strike and a breakdown of machinery. Assuming that the defendants are liable for the remaining number of days—ninety-eight—the amount they would be liable to pay to the plaintiff for the delay in delivering the vessel would be 980*l.*

The question as to which I have found some difficulty is this: whether the consequential results of the great coal strike, which, according to the verdict of the jury, delayed the completion of this vessel for seventy days, can be said to be covered by the exceptions clause in the contract. The contract which provides for the steamer being delivered on or before February 28, 1913, contains this exceptions clause: "If the said steamer is not delivered entirely ready to purchaser at the above-mentioned time, the builders hereby agree to pay to the purchaser for liquidated damages, and not by way of penalty, the sum of ten pounds sterling (10*l.*) for each day of delay and in deduction of the price stipulated in this contract." Then follow certain words, written in English it is true, but obviously by a gentleman not familiar with the English idiom, although the sense is plain enough. The words are: "being excepted only the cause of force majeure, and/or strikes of workmen of the building yard where the vessel is being built, or the workshops where the machinery is being made, or at the works where steel is being manufactured for the steamer, or any works of any sub-contractor." The question turns upon the words "force majeure." Mr. Hudson for the plaintiff has argued that those words can under no circumstances cover a strike or the consequences of a strike, and in particular that they cannot do so in this case because, if, as I am bound to do, I take the clause as a whole, I shall find that strikes are a special cause of exception. Both of those arguments are worthy of close attention, and I may say that my opinion has fluctuated a great deal in the course of the case.

The words "force majeure" are not words which we generally find in an English contract. They are taken from the Code

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Napoléon, and they were inserted by this Roumanian gentleman or by his advisers, who were no doubt familiar with their use on the Continent. I have had the evidence of a Belgian lawyer as to their meaning, and he said that the words are understood on the Continent to mean "causes you cannot prevent and for which you are not responsible." Mr. Hudson contended that they practically meant the same thing as "vis major," which in substance meant the same thing as "the act of God." In my construction of the words "force majeure" I am influenced to some extent by the fact that they were inserted by this foreign gentleman who was familiar with their meaning upon the Continent, but I am not sure that I am on that account bound or entitled to give them the full meaning that they have upon the Continent. At the same time I cannot accept the argument that the words are interchangeable with "vis major" or "act of God." I am not going to attempt to give any definition of the words "force majeure," but I am quite satisfied that I ought to give them a more extensive meaning than "act of God" or "vis major." The difficulty is to say how much more extensive.

The facts relating to this point are that after the contract was made the universal coal strike broke out on March 1. True, at the date when the contract was made it was obvious that a strike might take place. The strike did take place, and the result, as far as the defendants were concerned, was that the works from which they had contracted to obtain their materials for other ships—not the one in question—got behindhand. Every one knows that ships can only be built in a certain way and in certain berths and that they are built in turn. It was in contemplation to build the plaintiff's steamer in berth number 2; it was to follow immediately in that berth ship 239, which was in turn to be laid down first. The result of the coal strike and the defendants' inability to obtain materials was this, that ship 239 occupied the berth for a much longer time than she otherwise would have done, and consequently the plaintiff's ship could not be laid down till some time later. Was the detention of the berth in those circumstances a case of force majeure? If it had been the direct result of the coal strike there would have been great difficulty in

saying that the case came within the exceptions clause, seeing that certain strikes are there particularly mentioned. It would have been difficult to hold that another strike operating directly upon this ship ought to be added to the specific strikes mentioned in the clause. It was not, however, the direct operation of this strike which caused the damage. What did cause the damage was the general dislocation of the defendants' business and the business of the manufacturers of steel plates, &c., in the north, and in those circumstances I think I am justified in saying that did constitute a case of force majeure. Of course if I were to give the words the full meaning attributed to them by the Belgian lawyer there would be no doubt about the matter, but giving them a more restricted meaning I think that the complete dislocation of business in the north of England as a consequence of the universal coal strike, which operated directly on the ship in turn for building previously to the plaintiff's steamer, and only indirectly on the plaintiff's steamer, did come within the reasonable meaning of the words "force majeure." To the extent of the seventy days' delay due to this cause the defendants are therefore absolved.

The defendants claimed an allowance of certain other days in respect of bad weather, a shipwrights' strike, breakdown of machinery, football matches, and a funeral. So far as the shipwrights' strike is concerned it comes within the very words of the exceptions clause. As to delay due to breakdown of machinery it comes within the words "force majeure," which certainly cover accidents to machinery. The term "force majeure" cannot, however, in any view, be extended to cover bad weather, football matches, or a funeral. These are the usual incidents interrupting work, and the defendants, in making their contract, no doubt took them into account.

I shall give effect to the finding of the jury and allow the defendants the seventy days during which business was dislocated; for the shipwrights' strike there will be an allowance of two days, and for the breakdown of machinery five days, making in all a total allowance of seventy-seven days, and leaving ninety-eight days for which the defendants are liable, which at 10*l.* a day makes a sum of 980*l.* To that will be added 20*l.* which the

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parties have agreed as interest, and there will therefore be judgment for the plaintiff for 1000*l.* and costs.

Judgment for plaintiff.

Solicitors for plaintiff: *Gibbs, White & Co., for E. R. Payne, Cardiff.*

Solicitors for defendants: *Downing, Handcock, Middleton & Lewis, for Bolam, Middleton & Co., Sunderland.*

J. S. H.

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Dec. 11.

PRANCE *v.* LONDON COUNTY COUNCIL.

Shop—Shop Assistant—Person employed "mainly in connection with the serving of customers"—Employment facilitating but not Essential Part of serving of Customers—Shops Act, 1912 (2 & 3 *Geo.* 5, *c.* 3), *s.* 1, *sub-s.* 1, *s.* 19.

By s. 1, sub-s. 1, of the Shops Act, 1912, it is enacted that "On at least one week day in each week a shop assistant shall not be employed about the business of a shop after half-past one o'clock in the afternoon."

By s. 19, sub-s. 1, "the expression 'shop assistant' means any person wholly or mainly employed in a shop in connection with the serving of customers . . . .":—

Held, that a person is employed "in connection with the serving of customers" if his services are rendered for the purpose of facilitating the serving of customers, although the services are not an essential part of the operation of serving.

A potman employed in a public-house by the appellant, a licensed victualler, was mainly employed in (1.) putting up tables for customers' dinners and taking them down again; (2.) cleaning knives in so far as they were for subsequent use at the customers' tables; (3.) polishing pewter and copper measures used thereafter for measuring or serving out drinks to customers; (4.) collecting glasses after they had been used by customers from various parts of the bars for cleaning by the barmen; (5.) cleaning and tidying the premises for use by customers at various times of the day. He did not have any half-holiday during the week. The appellant having been convicted by a magistrate upon an information charging him with unlawfully failing to comply with the provisions of s. 1, sub-s. 1, of the Act:—

Held, that the conviction was right inasmuch as all the five duties were sufficiently proximate to the serving of customers to justify the

magistrate in holding that they were discharged in connection with the serving of customers within the meaning of the Act.

Judgment of Avory J. in *Melluish* v. *London County Council* [1914] 3 K. B. 325 commented upon.

CASE stated by a metropolitan magistrate.

An information was preferred on behalf of the respondents, the London County Council, against the appellant, William Prance, charging that he the appellant during the week ending on February 7, 1914, at a shop known as 34—36, Seven Sisters Road, in the county of London, in respect of the employment of a shop assistant, one Harry Fry, did unlawfully fail to comply with the provisions of s. 1, sub-s. 1, of the Shops Act, 1912.

At the hearing of the information the following facts were proved or admitted:—

The appellant was a licensed victualler carrying on business at a public-house known as the "Enkel Arms," 34—36, Seven Sisters Road, in the retail sale of intoxicating liquors and the other commodities usually sold by a licensed victualler. Harry Fry was employed by the appellant during the week in question at the premises as a potman, and was so employed from 7 A.M. until 12.30 night, having during that time two hours off for meals and three hours for rest. During the week ending February 7, 1914, Fry had no half-holiday. From 7 A.M. to 9.30 A.M. Fry's employment consisted in the permanent brightening with sand for the day of seven or eight pewter quart pots which subsequently during the day were used by customers for the consumption of malt liquor, in sweeping up inside and outside the public-house and in washing the floors of the premises generally and making them clean and tidy for the reception of customers. The washing of the pewter pots and other drinking vessels after or before the use thereof by customers was not done by Fry, but by the barmen. From 9.30 to 10.30 Fry had breakfast. From 10.30 A.M. until 2 P.M. Fry's employment consisted in washing and cleaning the front of the premises, in the polishing for the day of the copper and metal measures afterwards used throughout the day by the barmen to measure the drinks sold to customers, in cleaning the brasswork about the house generally, such as

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the door handles, taps, &c., in cleaning out the customers' lavatory, cleaning the boots of the household, cleaning the knives used by the household and for subsequent use in the business for the workmen's dinners, filling the coal scuttles, and doing the rough work in the private part of the house. Just before 12 o'clock Fry erected tables in the bars for workmen customers' dinners and just before 2 P.M. took them down again. From 2 P.M. until 3 P.M. Fry went to his dinner. From 3 P.M. until 5 P.M. his employment consisted in sweeping up all round the house inside and out and finishing off any cleaning work not completed in the morning. From 5 P.M. until 8 P.M. he had tea and rest. At 8 P.M. he put on uniform and was on duty inside the house and at the door of the premises to tidy up the business part of the house and keep it decent for customers and to keep out undesirable customers. At closing time he assisted in shutting up the house.

During the period from 8 P.M. to 12.30 night and at other times of the day, when in the bars, it was part of Fry's employment to collect glasses which had been used by customers and put them on the counters for the barmen to wash, and as the place got dirty from time to time it was part of his employment to keep it clean and tidied up. He neither took orders nor served customers nor delivered goods.

It was contended on behalf of the appellant that none of Fry's employments were "in connection with the serving of customers" within the meaning of s. 19 of the Shops Act, 1912, and that there was no evidence before the magistrate upon which he could in law hold that Fry was a shop assistant within the meaning of s. 1, sub-s. 1, and s. 19, sub-s. 1, of the Shops Act, 1912 (1), or convict the appellant of the offence with which he was charged.

(1) Shops Act, 1912 (2 Geo. 5, c. 3), s. 1, sub-s. 1: "On at least one week day in each week a shop assistant shall not be employed about the business of a shop after half-past one o'clock in the afternoon."

Sub-s. 4: "In the case of any contravention of, or failure to comply with, the provisions of this section, the occupier of the shop shall be guilty of an offence against this Act, and shall be liable to a" penalty.

Sect. 19, sub-s. 1: "In this Act:—

"The expression 'shop assistant' means any person wholly or mainly employed in a shop in connection with the serving of customers or the receipt of orders or the despatch of goods."

It was contended on behalf of the respondents that all Fry's employments were employments in and about a shop in connection with the serving of customers within the meaning of the section, and that if not all of the duties at any rate the main part of the employment of Fry was employment in connection with the serving of customers within the meaning of the section.

The magistrate was of opinion that the employment of Fry in so far as he was employed in the operations of (1.) putting up tables for customers' dinners and taking them down again, (2.) cleaning knives in so far as they were for subsequent use at the customers' tables, (3.) the polishing of pewter and copper measures used thereafter for measuring or serving out drinks to customers, (4.) the collecting of glasses after they had been used by customers from various parts of the bars for cleaning by the barmen, and (5.) the cleaning and tidying of the premises for use by customers at various times of the day constituted employment in a shop in connection with the serving of customers within the meaning of s. 19, sub-s. 1, of the Shops Act, 1912; and comparing all that part of Fry's employment which consisted of the five operations with the whole of his employment, the magistrate was of opinion that Fry was mainly employed in a shop in connection with the serving of customers within the meaning of the section, and that he was a shop assistant within the meaning of s. 1, sub-s. 1, and s. 19, sub-s. 1, of the Shops Act, 1912, and he therefore convicted the appellant.

The question for the opinion of the Court was whether any one or more of the five employments particularly enumerated above was or were not sufficiently proximate to the serving of customers in the shop within the meaning of s. 19, sub-s. 1, of the Act to justify the magistrate in regarding it as an employment in connection with the serving of customers. If any one or more of the five employments ought not in the opinion of the Court to have been so regarded by the magistrate the case was to be remitted to him with the opinion of the Court thereon. If all the five employments were in the opinion of the Court rightly regarded by the magistrate as employment in connection with the serving of customers the conviction was to stand.

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F. Wootten, for the appellant. The question is whether Fry was a shop assistant or not. It is not disputed that the public-house was a shop. Every shop assistant must have some connection with the customers and with the article sold. Some limitation must be placed on the definition contained in s. 19 of the Shops Act, 1912, having regard to s. 1, sub-s. 1, of the Act. The magistrate, having decided whether a particular operation is sufficiently proximate to the serving of customers, had to decide whether Fry was mainly occupied in the operation. None of the operations come within the principle of the decision in *Mellwish* v. *London County Council* (1) inasmuch as they are not directly connected with serving customers. The test is whether if the operation under consideration were omitted the serving would be hindered. If it would, the operation would be directly connected with the service and would be in connection with the serving of customers within the meaning of s. 19 of the Shops Act, 1912. If the tables were not put up and taken down, although the customers might have to eat their meals on their laps or on the counter, the service would not be hindered. Taking down the tables has nothing to do with the service. It is to make the place more convenient for the reception of customers. Nor would omitting to brighten the pewter or copper pots hinder the service. It would only be the omission of an item of attractiveness, and the same observation applies to tidying up the place during the day. It has no immediate connection with ministering to the wants of the customers. The operation must be a link in the chain of circumstances which are connected with supplying the customers. [The Shops Act, 1913 (2 & 3 Geo. 5, c. 24), was also referred to.]

A. H. Bodkin, for the respondents. Whether an operation is one in connection with the service is a question of fact. The object of the Shops Act, 1912, is that every shop assistant should have a half-holiday. It is sufficient, although the assistant may be employed outside the shop and even miles away, if he is employed about the business of the shop. The words "in connection with the serving of customers" in s. 19, sub-s. 1, of the Shops Act, 1912, are very wide and are in striking contrast to the words of s. 3 of the Act, which requires seats to be provided

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where female shop assistants are employed "in the serving of customers." In *Melluish* v. *London County Council* (1) the distinction between the language of the two sections is pointed out by Avory J. and Shearman J. In determining whether the employment is one "in connection with the serving of customers" regard must be had to the particular business in which the shop assistant is employed. Fry was employed in and about the counters of the shop when the customers were there. The trade of a publican is a complex one involving the proper preparation of food under sanitary conditions. The word "direct" in the judgment of Avory J. in *Melluish* v. *London County Council* (1) is not necessary to that judgment. All the five operations mentioned in the present case are in connection with the serving of customers although they are not all equally proximate. The Shops Act, 1913, only applies where it has been adopted by a particular trade. It has not been adopted by the trade of a publican.

F. Wootten, in reply. If any one of the operations in *Melluish* v. *London County Council* (1) had been omitted the serving of the customers could not have taken place, and the ground of the decision was that the operations were directly connected with the serving of customers.

LUSH J. By s. 1, sub-s. 1, of the Shops Act, 1912, it is enacted that on at least one day in each week a shop assistant shall not be employed about the business of a shop after half-past 1 in the afternoon; and by s. 19, sub-s. 1, the expression "shop assistant" means "any person wholly or mainly employed in a shop in connection with the serving of customers or the receipt of orders or the despatch of goods." The appellant was convicted by the magistrate of having committed an offence against s. 1 of the Act of 1912, and the question raised in the case stated by the magistrate is whether one Fry, who was employed by the appellant as a potman on the premises, a public-house, was a shop assistant within the meaning of the Act. The learned magistrate was of opinion that the employment of Fry in so far as he was employed in the operations which are specifically set out under the heads 1 to 5 inclusive constituted employment "in a shop in

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connection with the serving of customers" within the meaning of s. 19 of the Act, and, comparing that part of his employment which consisted of those five operations with the whole of his employment, he was of opinion that Fry was mainly employed in connection with the serving of customers, and the question for our opinion is whether any one or more of these five employments is sufficiently proximate to the serving of customers to justify him in regarding it as an employment in connection with the serving of customers. If we think that any one or more are not sufficiently proximate the case is to be remitted to him.

In my opinion all those five duties are sufficiently proximate to the serving of customers to justify the magistrate in holding that they were discharged "in connection with the serving of customers" within the meaning of the Act. It is very difficult, of course, to define the degree of remoteness or proximity which on the one hand would prevent a duty from being, or on the other hand would make it, a duty discharged "in connection with the serving of customers"; but in my judgment a narrow interpretation ought not to be placed upon the words in s. 19, nor ought the scope of the benefit which s. 1 was intended to confer upon persons employed in shops to be cut down. I am not sure that I quite understand the meaning of the words used by my brother Avory in *Melluish* v. *London County Council* (1) when he said "I think there must be a direct connection with the serving of customers and not a remote and indirect connection." Of course the duty or service may be so remote from the serving of customers as not properly to be capable of being called a duty or service discharged in connection with the serving, and in that sense I quite agree with what my brother Avory said; but if the words were intended to indicate that the services rendered must be an essential part of the operation of serving, although not the actual serving, then with great respect I cannot think that that is a right limitation to put upon the expression "in connection with the serving of customers" in s. 19, nor was it, as I gather, the view of all the members of the Court in *Melluish* v. *London County Council*. (1) It seems to me that any service which is rendered by a person with a view to the serving of customers, if the

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service is one that is rendered for the facilitating of the service of customers,—a service that is rendered in order to make the serving of customers more comfortable or more sanitary, or in whatever way the service may be facilitated—is one which is rendered in connection with the serving of customers within the meaning of s. 19; and although I had at one time a little doubt about the service numbered 5 in the case, I have come to the conclusion that there is not one of those five which ought to be considered so remote as to compel the Court to say that that service must be disregarded and that the magistrate must determine the case on the footing that that service is out of the discussion. I think that the learned magistrate took the right view when he held that all the five services were rendered in connection with the serving of customers, and that the appeal ought therefore to be dismissed.

ROWLATT J. I am of the same opinion. The words "in connection with the serving of customers" are very wide—not to say vague—and it is obvious that there is a limit to their application. A shop exists for the purpose of serving customers, and in one sense everything that is done in the shop and with reference to the business is in connection with the serving of customers; but to place that construction upon the words would be, of course, to give them a far too extended meaning. The exact formula which one ought to adopt in order to draw the line at the right place is, I am bound to say, beyond my power to enunciate. Avory J. in *Mellwish* v. *London County Council* (1) used the word "direct" as opposed to "indirect," but that word again requires further definition and in itself does not carry us very much further. I incline to the opinion that it is a matter of degree, in which one has to be guided by common sense, and not really a question of law. Some one has to decide the question of degree, and I think that the tribunal of fact really ought to decide that, provided it does not go hopelessly wrong in the sense of deciding without any evidence in support of the decision.

With regard to all the five occupations enumerated in the case

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stated by the magistrate, I am not prepared to say, as a matter of law, that none of them include any single act which is too far away from the actual handing of the consumable article to the customer to be "in connection with" serving him. I am not prepared to say that every act involved in, for instance, polishing measures or cleaning or tidying up the premises must be held to be in connection with the serving of customers. Perhaps some of the acts of cleaning were too far away, but looking at No. 5—the strongest case in favour of the appellant—as a whole, you find the man going about and remedying the disorder and dirt which have been occasioned by serving customers; and in remedying that, I think he is doing work in connection, a posteriori, with the serving of the customer who brought about that state of affairs which requires remedying. I think it was certainly within the power of the magistrate, and for him, to decide whether as a matter of degree, in each of the five cases, the acts were or were not "in connection with the serving of customers." He has held, and I think rightly, that they were. In any event he had ample materials for so holding.

ATKIN J. I agree. It has to be remembered that in the Shops Act, 1912, ordinary licensed premises or premises for the sale of refreshments or intoxicating liquors are called "a shop," and the language in the statute is used in reference to shops generally. The particular kind of shops which are licensed premises are not quite like a shop in the ordinary sense of the word. In the case of an ordinary shop a customer enters and makes a contract for the purchase of a particular article, which is either delivered to him there and then or is afterwards delivered to his order; but in the case of licensed premises, treating them as a shop, the customer buys not merely the actual article of food or drink, but he pays for and buys further services in addition which are rendered to him by the shopkeeper, and are necessary to enable the customer with reasonable convenience to consume the food or drink on the premises, and the shopkeeper is also under an obligation to provide reasonable accommodation on the premises for the customer so to consume the food or

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drink. Now the service in a shop of that kind to the customer is not limited to merely putting before the customer the food or drink, but it also includes providing those further services which I have mentioned, and it seems to me that any person who is employed either in providing these services, or in assisting to make them when rendered by other persons more convenient and suitable to the customer, is certainly employed in connection with the serving of the customer. I think that all the five cases that are mentioned by the magistrate come within the limits I have indicated. I construe the last finding of the magistrate as meaning cleaning and tidying of the premises for use by the customers in the sense I have mentioned, inasmuch as accommodation must be provided for the customers. The cleaning and tidying the premises take place in order to enable the customers to use the premises in the way that they are entitled to use them for the money which they pay. That is part of the service which in fact is rendered to them at this particular shop. That being the case, I think that all these matters mentioned by the magistrate are evidence upon which he could find that this man was mainly employed in a shop in connection with the serving of customers.

Appeal dismissed.

Solicitors for appellant: *Maitland, Peckham & Co.*
Solicitor for respondents: *E. Tanner.*

J. E. A

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HANLEY *v.* PEASE & PARTNERS, LIMITED.

Master and Servant—Breach of Contract to employ Workman—Claim by Workman for Damages for Wrongful Dismissal—Suspension of Workman from working for One Day—Power of Court of Summary Jurisdiction to adjudicate upon Workman's Claim for Wrongful Dismissal without Amendment—Employers and Workmen Act, 1875 (38 & 39 *Vict. c.* 90), *ss.* 3, 4.

By s. 3 of the Employers and Workmen Act, 1875, "In any proceeding before a county court in relation to any dispute between an employer and a workman arising out of or incidental to their relation as such (which dispute is herein-after referred to as a dispute under this Act) the Court may, in addition to any jurisdiction it might have exercised if this Act had not passed . . . . adjust . . . . all such claims on the part either of the employer or of the workman, arising out of or incidental to the relation between them, as the Court may find to be subsisting, whether such claims are liquidated or unliquidated, and are for wages, damages, or otherwise . . . . ."

By s. 4, "A dispute under this Act between an employer and a workman may be heard and determined by a Court of summary jurisdiction, and such Court . . . . may order payment of any sum which it may find to be due as wages, or damages, or otherwise, and may exercise all or any of the powers by this Act conferred on a county court . . . .":—

Held, that the effect of the sections is to give the widest powers to a Court of summary jurisdiction, when a dispute between a workman and his employer comes before it, to deal not only with the strict and technical claim which one side or the other makes in the dispute, but to deal with all claims which in the course of the hearing it may turn out have been made by the workman against the master or by the master against the workman.

A workman absented himself from his work for one day without leave from his employers. The employers did not dismiss him, but suspended him from working on the following day, whereby the workman was prevented from earning the wages he would have earned on that day had he been allowed to work, namely, 6*s.* 2*d.* The workman thereupon made a claim under the Act before justices sitting as a Court of summary jurisdiction for 6*s.* 2*d.* damages for wrongful dismissal:—

Held, that, although upon the facts the workman's claim ought technically to have been for damages for refusing to allow him to perform his contract of service, the justices had jurisdiction under the Act to adjudicate upon the claim without an amendment, and to give the workman such damages as he would have been entitled to upon the claim with any proper amendment.

Held, further, that although the employers might have had a right to damages against the workman, they had no right to suspend him from

working for the one day inasmuch as by so doing they were taking upon themselves—after declining to dismiss the workman and electing to treat the contract as a continuing one—to assess their own damages for the workman's default at the sum which would be represented by one day's wages. The workman was therefore entitled to be awarded under the denomination of wages or damages the sum of 6*s.* 2*d.*, which represented the wages he would have earned on the day he was suspended, but which he did not earn owing to the employers' breach of contract.

CASE stated by justices for the county of Durham.

On June 23, 1914, a summons was preferred by the appellant Thomas Hanley under the Employers and Workmen Act, 1875 (1), against the respondents Pease & Partners, Limited,

(1) Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 3: "In any proceeding before a county court in relation to any dispute between an employer and a workman arising out of or incidental to their relation as such (which dispute is herein-after referred to as a dispute under this Act) the Court may, in addition to any jurisdiction it might have exercised if this Act had not passed, exercise all or any of the following powers; that is to say,

"(1.) It may adjust and set off the one against the other all such claims on the part either of the employer or of the workman, arising out of or incidental to the relation between them, as the Court may find to be subsisting, whether such claims are liquidated or unliquidated, and are for wages, damages, or otherwise . . . ."

Sect. 4: "A dispute under this Act between an employer and a workman may be heard and determined by a Court of summary jurisdiction, and such Court, for the purposes of this Act, shall be deemed to be a Court of civil jurisdiction, and in a proceeding in relation to any such dispute the Court may order payment of any sum which it may find to be due as wages, or damages, or otherwise, and may exercise all or any of the powers by this Act conferred on a county court: Provided that in any proceeding in relation to any such dispute the Court of summary jurisdiction—

"(1.) Shall not exercise any jurisdiction where the amount claimed exceeds ten pounds; and

"(2.) Shall not make an order for the payment of any sum exceeding ten pounds, exclusive of the costs incurred in the case; and

"(3.) Shall not require security to an amount exceeding ten pounds from any defendant or his surety or sureties."

Sect. 9: "Any dispute or matter in respect of which jurisdiction is given by this Act to a Court of summary jurisdiction shall be deemed to be a matter on which that Court has authority by law to make an order on complaint in pursuance of the Summary Jurisdiction Act, but shall not be deemed to be a criminal proceeding; and all powers by this Act conferred on a Court of summary jurisdiction shall be deemed to be in addition to and not in derogation of any powers conferred

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for that the appellant, being a servant to the respondents and having entered into a contract of service determinable by fourteen days' notice on either side, was wrongfully dismissed by the respondents, his employers, on June 15, 1914, without having given or received such notice, and the appellant claimed the sum of 6*s*. 2*d*. damages in respect thereof.

The claim for damages for breach of contract arose from the fact that the appellant together with another workman named Cooke employed at the by-product works in the coke-yard at the respondents' colliery absented himself from work on Sunday, June 14, 1914, without leave, and on Monday, June 15, the respondents by their local manager suspended him for that day (Monday), and as a consequence the workmen due to work on the shift from 6 A.M. to 2 P.M. on that day (about forty or more in number) refused to work, whereby the respondents were only able to partly work the by-product ovens on the latter date, being deprived of the regular workmen for that particular shift, and in consequence suffered considerable loss.

The following facts were either proved or admitted before the justices. The appellant was a cokeman in the employment of the respondents as a quencherman at the by-product works in the coke-yard of the respondents at Bowden Close Colliery (county Durham) and worked under certain rules or customs agreed between the associations representing the owners and workmen respectively with regard to by-product and other similar works, which formed part of the contract of service and employment between the parties. The appellant had been employed at these works for a period of two years and previously worked his Sunday "shift" regularly and without raising any objection to doing so and had agreed to do the work. The appellant did not present himself for work nor did he work on Sunday, June 14, 1914. The cokemen at the respondents' coke-yard (of which the appellant was one) had been told by their

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on it by the Summary Jurisdiction Act . . . ."

. . . . . .

"The Lord Chancellor may at any time after the passing of this Act, and from time to time make, and when made, rescind, alter, and add to, rules for carrying into effect the jurisdiction by this Act given to a Court of summary jurisdiction . . . ."

foreman (acting under the manager's instructions) that if they were ten minutes late on coming to work they would not be allowed to take out their boards, i.e., to start work, and the appellant believed this would be enforced. The reason given for not so working was that he had slept in (i.e., overslept himself). The appellant was suspended on June 15 for one day and not dismissed. Under the special circumstances the work required of the workmen to be performed on a Sunday was work of necessity having regard to the danger attached to the working of the works in question, and they were paid for this at a higher rate.

It was contended on behalf of the appellant (inter alia):—

(*a*) That the appellant was wrongfully dismissed or suspended.

(*g*) That being dismissed or refused work on Monday, June 15, without notice he suffered damages to the extent of 6*s*. 2*d*. in respect of that day.

It was contended on behalf of the respondents (inter alia):—

(*a*) That they had the right to dismiss or suspend a workman who failed (without any valid excuse) to come to work.

(*c*) That if the by-product oven plant at which the appellant only worked six days a week was allowed to cool down on the seventh day the restarting would be attended with great danger to life and property.

(*g*) That the appellant had not made out his case.

The justices were of opinion that this was a dispute between the employers and the workman arising out of or incidental to their relations as such. They found as a fact (inter alia):—

(*a*) That the work was a work of necessity because the failure to do the work would endanger the lives of workmen employed. If the ovens were allowed to cool down on Sunday there would be great danger in restarting them on the Monday.

(*b*) That the appellant had agreed to do the work on the Sunday and the respondents on their part were justified in their action in suspending him.

(*c*) That the appellant's claim for damages was not made out, and accordingly they gave judgment for the respondents.

The question for the opinion of the Court was whether the justices came to a correct decision in point of law.

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C. F. Lowenthal, for the appellant. The only question is whether, assuming an employer has not exercised his right which is inherent in the contract between an employer and workman of dismissing the workman, the employer has a right to suspend the workman. It is not admitted by the appellant that the respondents had a right in law to dismiss him, inasmuch as there was no wilful misconduct on his part, but the justices have found that even if they had the right to dismiss him they did not exercise it. If a master dismisses a servant for misconduct, he has terminated the contract by accepting the servant's repudiation of it. The justices have held that the employer can refuse to employ the workman for one day without notice. The workman overslept himself and believed that if he was ten minutes late he would not be allowed to work. That did not give the employer any right to dismiss him without notice. The employer affirmed the continuation of the employment but claimed the right to suspend it. There is no such right known to the law. If the contract subsists the only right the employer has for a breach of it by the workman is to sue for damages.

McCardie, for the respondents. The action was brought to recover 6*s*. 2*d*. damages for wrongful dismissal. The justices held that there was no wrongful dismissal and dismissed the summons. The action therefore, in the form in which it was brought, failed, and no amendment was asked for, nor had the justices any power to give leave to amend. At common law there is no power to amend after the action is before the Court. Any power to amend is the creature of statute. The appellant founded his claim upon wrongful dismissal (i.e., that the contract was terminated) and he cannot now recover the damages on the ground that the contract is still in existence. Under ss. 3 and 4 of the Employers and Workmen Act, 1875, the only power given to the justices is the power which the county court has under s. 3. Sect. 9 only relates to procedure. The effect of the sections is that the whole of the county court jurisdiction is abolished, including any power of amendment. The rules made by the Lord Chancellor under s. 9 contain no power of amendment. Under s. 4 the justices are not left at large with power to inquire into any rights the parties may have without regard to the relief

claimed. A specific jurisdiction of a civil nature is given to the justices, and s. 9 enacts that the procedure is to be in accordance with the Summary Jurisdiction Acts. The code applicable is therefore that contained in the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43). Unless the workman is subject to some code it is difficult to see what limit there is to the claim a workman might make. If the claimant is in no way bound by the form of his claim a great many difficulties would arise. Rule 2 of the Rules made under the Employers and Workmen Act, 1875, provides for the same forms of claim as those for a civil debt under the Summary Jurisdiction Acts. As no amendment was made or asked for the justices were entitled to say the claimant had no case. Whether or not a case for dismissal without notice has arisen is a question of fact. *Baster* v. *London and County Printing Works* (1) shows that forgetfulness may constitute such neglect of duty as to justify the master in dismissing the servant without notice. In the present case the absence of the appellant on Sunday might have caused enormous loss to the colliery and great danger to the workmen. A master is entitled to say to a servant "I dismiss you till to-morrow morning." He can determine the extent to which he dismisses the servant. *Pearce* v. *Foster* (2) shows that if the servant does anything incompatible with the due discharge of his duty to his master the master has a right to dismiss him. The right of a master to dismiss his servant is outside the doctrine of repudiation. If there has been repudiation by the servant, no doubt the master must accept it if he wishes to determine the contract. He did not do so in the present case. But he may also say "I dismiss you, but I am willing to take you back to-morrow." That is the position on the facts in the present case. It is desirable that a master should have the power to say "If you will come back to-morrow I will take you back," as he can then temper justice with mercy.

LUSH J. stated the facts and continued: The matter came before the justices upon the claim of the appellant for damages for wrongful dismissal and the whole matter of the dispute

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between the appellant on the one side and the employers on the other was considered by the justices. Questions arose on the hearing of that dispute with regard to the conduct of the appellant on the Sunday with which we have nothing to do, because Mr. Lowenthal on behalf of the appellant has confined the question which he asks this Court to consider to the propriety of the decision of the justices, who dismissed the appellant's claim for damages for wrongful dismissal. Mr. McCardie on behalf of the respondents has taken the point—not exactly as a preliminary point, but one which he very properly calls a highly technical one—that the appellant's claim for damages was a claim for damages for breach of contract, because it was not a claim for damages for wrongful dismissal in the proper sense. It was a claim for damages by the appellant because he contends that the employers were not at liberty to suspend him for the one day, or in other words to refuse to pay him wages for that one day's work without dismissing him. The justices found that the employers did not dismiss him, and Mr. McCardie therefore says that the justices were right in dismissing his claim because it was not properly a claim for wrongful dismissal. Mr. McCardie says that as there was no power of amendment the justices could not deal with it in the form in which it was made. In my opinion that is not a point of any substance. The clear intention of the Legislature as appears by ss. 3 and 4 of the Employers and Workmen Act, 1875, was to give the widest powers to a Court of summary jurisdiction when a dispute between workman and employer comes before it to deal not only with the strict and technical claim which one side or the other makes in the dispute, but to deal with all claims which in the course of the hearing it may turn out have been made by the workman against the master or by the master against the workman. It seems to me clear from s. 4 of the Act that the Legislature never intended a Court of summary jurisdiction to be hampered and fettered by difficulties as to mere form, but that it intended that the justices should deal with all disputes which might appear in the course of the hearing to have arisen between master and workman. There was no necessity to amend, and as regards that point I think the justices had full power to deal with this

claim treating it as a claim for damages for breach of contract and not as one for damages for wrongful dismissal.

The substantial question is: Had the appellant a claim in law for damages for breach of contract or not? Whether the right of a master to dismiss a servant for misconduct or breach of duty or anything else of the kind is treated as a right arising out of the ordinary right of a contracting party to put an end to the contract when there has been a repudiation by the other party, or whether it is treated as a right which the master has on the ground that obedience to lawful orders must be treated as a condition of the contract, is wholly immaterial. I do not think it is necessary to say which is the proper way to regard it, because in either view the right of the master is merely an option. The contract has become a voidable contract. The master can determine it if he pleases. Assuming that there has been a breach on the part of the servant entitling the master to dismiss him, he may if he pleases terminate the contract, but he is not bound to do it, and if he chooses not to exercise that right but to treat the contract as a continuing contract notwithstanding the misconduct or breach of duty of the servant, then the contract is for all purposes a continuing contract subject to the master's right in that case to claim damages against the servant for his breach of contract. But in the present case after declining to dismiss the workman—after electing to treat the contract as a continuing one—the employers took upon themselves to suspend him for one day; in other words to deprive the workman of his wages for one day, thereby assessing their own damages for the servant's misconduct at the sum which would be represented by one day's wages. They have no possible right to do that. Having elected to treat the contract as continuing it was continuing. They might have had a right to claim damages against the servant, but they could not justify their act in suspending the workman for the one day and refusing to let him work and earn wages. That being so, the justices in my opinion were wrong in saying that the appellant failed to substantiate his claim against the employers. I think he did substantiate a claim. Whether it be for wages or damages as represented by wages it is unnecessary to determine. The case

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must be remitted to the justices with a direction to award to the appellant whether under the denomination of wages or damages the sum of 6*s.* 2*d.*, which represents the wages the workman would have earned on the day he was suspended but which he did not earn owing to the employers' breach of contract.

ROWLATT J. I am of the same opinion. With regard to the first point, if we are going to explore the regions of highest technicality, I think the right form of the workman's claim was for unliquidated damages against the employer for refusing to allow him to earn a day's wage by doing a day's work. If the workman brings the claim for wrongful dismissal after he has returned to work and has only failed to work for a day and claims one day's wages, it seems to me that the Court ought to construe the claim in all good sense as one for damages for refusing to allow him to earn one day's wages.

As regards the point of substance it is obvious that the employer has no implied power to punish the workman by suspending him for a certain period of his employment, the contract subsisting all the time. He has power if the occasion arises—but there is no finding in the present case that the occasion had arisen—to dismiss a workman and propose a new employment to begin on the next day which the workman may or may not accept. The facts, however, do not support that view of the case. The appeal should be allowed.

ATKIN J. I agree. I think on the first point that by s. 4 of the Employers and Workmen Act, 1875, coupled with the powers given by way of reference to s. 3 the Court of summary jurisdiction had ample power to deal with that which was in fact the dispute between the parties whatever it was styled in the claim.

On the other point I entirely agree that in the circumstances of this case the master had no power to suspend the contract in the sense which really means the fining of the employee in the sum of one day's wages for his previous default. If he had such a power by the contract or otherwise I think it would have to be very carefully considered in the light of the more recent Truck

Acts. But for the reasons already given I think there was no such power, and I think the decision of the justices was wrong.

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Appeal allowed.

Solicitors for appellant: *Stanley Evans & Co., for Dix & Harle, Newcastle-on-Tyne.*

Solicitors for respondents: *Rawle, Johnstone & Co., for Cooper & Goodger, Newcastle-on-Tyne.*

J. E. A.

BUSH *v.* ROGERS.

[1914 B. 998.]

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Jan. 19.

Practice—Costs—Issue—Event—Rules of the Supreme Court, 1883, *Order* LXV., *rr.* 1, 2.

By rule 1 of the Rules of the Supreme Court, 1883, Order LXV., where any action is tried with a jury the costs shall follow the event unless the judge shall otherwise order. By rule 2 when issues in fact and law are raised upon a claim the costs of the several issues shall, unless otherwise ordered, follow the event.

Where at the trial of an action with a jury several questions are left to the jury the questions and their answers do not necessarily constitute separate issues within the meaning of rule 2. The judge at the trial is the proper person to say whether there is any separate issue upon which the party unsuccessful in the action is entitled to his costs.

APPLICATION for a direction as to costs in the circumstances stated below.

The facts and arguments appear in the written judgment of Bankes J.

H. S. Simmons, for the plaintiff.

P. B. Morle, for the defendant.

BANKES J. delivered the following written judgment:—

In this case I have been asked for a direction upon a matter of practice of very considerable importance.

The matter arises in this way. The plaintiff sued the defendant for 60*l.* money lent made up of two separate sums of 50*l.* and 10*l.* alleged to have been lent on different occasions.

The defence was that the transactions were not loans at all but advances of money upon a joint adventure. The issues with

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regard to the two sums of money are in my opinion clearly separate issues. The case was tried before me with a jury, who found that the 10*l.* transaction was a loan, but that the 50*l.* was not. Upon these findings the plaintiff's counsel asked for judgment for 10*l.*, which I gave him; and he also asked for a certificate for High Court costs, which I refused. The defendant's counsel asked for judgment upon the issue on which he had succeeded, but I did not give it him because, as I stated at the time, I did not believe it was necessary, as, if there was any separate issue upon which he had succeeded, he would be entitled to his costs under Order LXV., rr. 1, 2. (1) The associate drew up his certificate, in which he set out the findings of the jury and the judgment which I had directed to be entered, and added that the judge "made no order as to costs." This last statement was hardly correct. It is true in one sense that I did make no order as to costs, but there is this difference between the case of the plaintiff and that of the defendant in that respect. In the one case I refused to allow the plaintiff any costs, but in the other case I only said that I would make no order because I thought that such an order was unnecessary.

The officials in the judgment department have refused to enter any judgment upon the associate's certificate unless and until I direct whether the findings of the jury are issues within the meaning of Order LXV., rr. 1 and 2.

The difficulty has arisen as a result of the recent decision of the Court of Appeal in *Howell* v. *Dering*. (2) To explain the position it is necessary to consider the practice hitherto existing and the rules applicable to the point.

At a trial at nisi prius it is the duty of the associate to make

(1) Rules of the Supreme Court, 1883, Order LXV. :—

Rule 1: "Subject to the provisions of the Acts and these Rules, the costs of and incident to all proceedings in the Supreme Court . . . . shall be in the discretion of the court or judge . . . . Provided also that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the court, shall, for good cause, otherwise order."

Rule 2: "When issues in fact and law are raised upon a claim or counterclaim, the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event . . . ."

(2) Ante, p. 54.

out a certificate of the result of the trial under Order XXXVI., r. 41. The practice is without any special direction from the judge to enter all findings of fact by the jury on the face of the certificate, and to enter also what the judgment directed by the judge is, and any order he may make as to costs. The certificate is then taken by the party in whose favour judgment has been given to the judgment department where the officials draw up and enter the formal judgment. Order XXXVI., r. 39, gives the judge power at or after trial to enter any judgment that he thinks fit, and Order XXXVI., r. 42, authorizes the judgment department to enter judgment upon any certificate of an associate which shows that the judge has ordered that judgment shall be entered for any party absolutely.

The duty of the officers of the judgment department is of course merely ministerial, and their practice has been in cases tried by a jury, where the jury have found a general verdict for the plaintiff or for the defendant as the case may be, to treat the direction of the judge that judgment is to be entered for the successful party as a direction to them that the event has been decided in that party's favour, and to enter judgment for costs in accordance with that direction.

In cases, however, where questions have been submitted to the jury and answers given to those questions, the practice has been to treat each question and answer as a separate issue, and to enter a judgment for the successful party for the costs of each issue (interpreting these words as being equivalent to question and answer) which the jury had answered in his favour, even though the associate's certificate contained no direction from the judge who tried the case that such a course should be followed.

This practice was apparently approved in *Hoyes* v. *Tate* (1), though the point was not taken that the officer in the judgment department was doing something more than a mere ministerial act in entering any form of judgment without some direction from the judge. In the recent case of *Howell* v. *Dering* (2) the Court of Appeal decided that it was wrong to assume that because separate questions were put to a jury each question necessarily constitutes a separate issue, and set aside a judgment which had

(1) [1907] 1 K. B. 656. (2) Ante, p. 54.

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been entered up on that footing. In consequence of this decision the officials of the judgment department feel that they cannot any longer follow their former practice, as they would be exceeding their jurisdiction if they took upon themselves the duty of deciding what are and what are not separate issues in any action.

As a result they have declined to enter any judgment in the present case without some direction from me as to whether the answers of the jury constitute separate issues.

On one point I think that the officials of the judgment department are clearly in the right. They at any rate have no power to decide any question of the kind. I have felt some doubt whether the proper course is for the judge at the trial to give some direction on the point, or whether it is not for the taxing Master, even though the judgment as entered contains no direction to him to do so, to decide whether the unsuccessful party has not succeeded on some issue and to tax the costs accordingly. This was the course apparently followed in *Slatford* v. *Erlebach* (1); but, as I read the later case of *Ingram & Royle* v. *Services Maritimes du Tréport* (2), the course taken by the taxing Master in *Slatford* v. *Erlebach* (1) was not approved, and the Court held that in every case whether tried by a jury or not the judgment should contain a direction as to what costs (if any) either party is entitled to.

Under these circumstances I am of opinion that the judge who tries the case is the proper person to say whether there is any separate issue upon which the unsuccessful party is entitled to his costs, and that I ought to have acceded to Mr. Morle's application in this case to give him judgment in respect of the issue of the 50*l*.

I think that I have still power to do this, and accordingly I direct that the associate's certificate shall be amended so as to include a direction that the defendant is entitled to his costs (if any) on the issue as to the 50*l*.

Solicitor for plaintiff: *C. S. Tomlinson.*

Solicitor for defendant: *F. Daphne.*

(1) [1912] 3 K. B. 155. (2) [1914] 3 K. B. 28.

W. H. G.

[IN THE COURT OF APPEAL.]

C. A.
1915
Jan. 30.

ROBINSON *v.* SMITH.

[1913 R. 1874.]

Practice—New Trial—Fresh Evidence—Verdict obtained by Fraud.

The plaintiff in an action for breach of promise of marriage, the defence to which was a denial of the promise, described herself at the trial as a single woman. The jury found a verdict for the plaintiff. The defendant applied for a new trial on the ground that since the trial he had obtained evidence from two persons, previously unknown to him, to the effect that some years before the trial the plaintiff had made statements to them which, if true, proved that before the date of the promise the plaintiff had been married to a man who was still living. The plaintiff filed an affidavit in opposition to the application in which she did not deny making the statements, but stated that she had never been married to the man or to any one else:—

Held by Buckley and Bankes L.JJ., Pickford L.J. dissenting, that there ought to be a new trial, but that it must be confined to the issue whether the plaintiff was a married woman at the date of the defendant's promise to marry her.

Application by the defendant for a new trial.

The plaintiff, who was described in the statement of claim as a spinster, sued the defendant for damages for breach of promise of marriage. The defence was a denial of the promise. The action was tried at the Manchester Assizes in February, 1914. The jury gave a verdict for the plaintiff for 125*l.* and judgment was entered for the plaintiff for that sum. The ground of the application for a new trial was that the verdict amounted to a substantial miscarriage of justice by reason of facts having been discovered since the trial which could not previously have been within the defendant's knowledge or been ascertained by him before the trial, which facts showed the plaintiff's evidence to be deliberately false in the essential points at issue at the trial.

Leave having been given to the defendant to adduce evidence in support of the motion, affidavits of the defendant, a Mrs. Currie, and a Mrs. Hollingworth were filed, from which it appeared that immediately after the verdict Mrs. Currie told the defendant that she knew all about the plaintiff and would have

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given evidence for him if she had known of the trial in time, and that he thereupon made inquiries. Mrs. Currie had first known the plaintiff in 1901; and in 1903 or 1904 she had received a wedding card indicating that the plaintiff was married to a man named Lambie, and was living with him at an address in Glasgow, where she subsequently saw the plaintiff; she had received letters from the plaintiff signed in the name of Lambie, in which she referred to Lambie as her husband. Lambie was still alive. A similar wedding card had also been received by Mrs. Hollingworth, who had corresponded with the plaintiff in the name of Lambie and had been introduced by the plaintiff to Lambie as her husband.

The plaintiff filed an affidavit in reply in which she stated that she was a single woman and had never been married to Lambie or to any one else, and that the wedding cards had been sent out by Lambie, but that no marriage had, in fact, ever taken place.

A. Neilson, for the defendant. The plaintiff represented at the trial that she was a single woman. The fresh evidence obtained by the defendant shows that that statement was untrue, and the verdict was therefore obtained by fraud. That is a good ground for granting a new trial: *Young* v. *Kershaw* (1); *Warham* v. *Selfridge*. (2) The defendant asks for leave to amend his defence by alleging that at the date of the promise the plaintiff was a married woman.

Spokes, for the plaintiff. There is no authority for granting a new trial on the ground of the discovery of fresh evidence relating to an issue which was not pleaded or raised at the trial. In any event, to justify granting a new trial the fresh evidence must be of such a character that if it had been adduced at the trial the verdict must have been the other way: *Young* v. *Kershaw* (1), per A. L. Smith L.J.; *Anderson* v. *Titmas*. (3) The evidence relied on by the defendant is very far from proving conclusively that the plaintiff is a married woman. It amounts to no more than this, that the plaintiff described herself as the

(1) (1899) 81 L. T. 531. (2) (1914) 30 Times L. R. 344.
(3) (1877) 36 L. T. 711.

wife of the man with whom she was living. That is not an uncommon practice. If there had in fact been a marriage a copy of the marriage certificate could have been obtained.

BUCKLEY L.J. The plaintiff brought an action against the defendant to recover damages for breach of promise of marriage. The jury returned a verdict for the plaintiff. The defendant has applied to this Court for a new trial; and by leave further evidence has been adduced on the hearing of the application. The ground of the application is that the defendant has since the trial obtained fresh evidence which shows that the plaintiff deceived the Court in the conduct of her case by representing that she was a single woman, whereas in fact she was a married woman. One of the grounds on which a new trial may be granted is that the verdict was obtained by fraud, and if the plaintiff at the date of the promise was in fact a married woman it is clear that she did obtain the verdict in her favour by fraud. The question to be considered is whether the evidence adduced by the defendant in support of the allegation that the plaintiff was a married woman at the date of the promise of marriage is sufficiently strong to justify this Court in granting a new trial. It appears that immediately after the verdict a Mrs. Currie came to the defendant and told him that she could give evidence in his favour. It was of course then too late for her to do so. The defendant swears that he has discovered, and his evidence is supported by that of two witnesses, that letters before the date of the promise had been written by the plaintiff signed by her in her alleged married name and speaking of the man, to whom she is alleged to have been married, as her husband; that the plaintiff has also sent out wedding cards in which she and this man are referred to as being husband and wife; and that the man is still alive. The plaintiff does not deny that the wedding cards were sent, but says that they were sent by the man and not by her. There is, I think, sufficient to induce the Court to grant a new trial on the ground that if this evidence is true the plaintiff was guilty of fraud at the trial. But the defendant ought not to have a new trial on the questions whether or not there was a promise to marry or as to the amount of damages. He has

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Buckley L.J.

asked for leave to amend his defence by alleging that the plaintiff was at the date of the promise a married woman. In my opinion sufficient ground has been shown for granting a new trial on that one issue. The cases which have been cited, *Anderson* v. *Titmas* (1), *Young* v. *Kershaw* (2), and *Warham* v. *Selfridge* (3), do not appear to me to be in point. A new trial was there asked for on the ground of the discovery of fresh evidence as to a fact which had already been in issue, whereas in the present case the fresh evidence is directed to an entirely new issue.

Counsel for the plaintiff contends that in any event she ought to have the costs of the first trial. I do not think so. For if the defendant succeeds at the new trial that will show that the plaintiff obtained the costs of the first trial by fraud. There will, therefore, be an order for a new trial on the question raised by the amendment of the defence. The costs of the first trial and of this application will abide the result of the second trial.

PICKFORD L.J. I regret that I am unable to agree. I do not think there ought to be a new trial in this case. It is not necessary, in my opinion, to consider whether there is any power to grant a new trial on an issue which was not raised at the original trial and on that issue alone; nor is it necessary to discuss the nature of the fresh evidence relied on in the cases which have been cited. In order to justify the granting of a new trial, even if it be possible to grant it, the fresh evidence must be very clear and strong, and I am not satisfied that the evidence in this case is such that a new trial ought to be granted. The plaintiff has admittedly described herself in letters and in a wedding card as a married woman; but the defendant has had eleven months in which to make inquiries, and he has not taken any trouble to investigate the matter or to find out whether the plaintiff really is married to the man whom she has written of as being her husband. The plaintiff admits describing herself as a married woman, but swears that she is not in fact married. There is therefore a distinct controversy of fact as to whether she is married or not. In these circumstances

(1) 36 L. T. 711. (2) 81 L. T. 531.
(3) 30 Times L. R. 344.

I do not think the evidence is sufficiently strong and clear to justify the granting of a new trial.

BANKES L.J. In my opinion a new trial ought to be granted on the single issue, whether the plaintiff was a married woman at the date of the promise of marriage. The circumstances of the case are very exceptional. Shortly after the trial evidence came to the knowledge of the defendant which he could not have obtained before, and which was material to the issue. If the defendant's application for a new trial rested solely on alleged verbal statements by the plaintiff as to being a married woman, I should not have attached much importance to it, for it would be a case of oath against oath as to whether the statements were made. But the important thing to my mind is that the plaintiff has admittedly written letters describing herself as a married woman and referring to the man Lambie as her husband. It is admitted that Lambie is alive at the present time, and, therefore, in the absence of any explanation the evidence is conclusive as to her being a married woman. There is also the circumstance of wedding cards being sent out. The importance of that is that the plaintiff says that the man sent them out, which seems to me rather to support the view that she is married. In the face of this evidence the fact that the plaintiff swears that she has never been married is not in my opinion a sufficient reason for refusing to grant a new trial, because the whole question in issue is whether she presented a fraudulent case to the Court at the original trial. I think, therefore, that there ought to be a new trial on this one question.

Order for new trial.

Solicitors for plaintiff: *Radford & Frankland, for Walker, Dean & Co., Manchester.*

Solicitors for defendant: *Vincent & Vincent, for W. H. Clarke, Middleton & Co., Leeds.*

F. O. R.

1915
Jan. 25.

MORRISON *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Land Values — Assessable Site Value — Divestment — Buildings — Structures—Walls used to divide up Land and to shelter Farm Stock—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 25, *sub-s.* 2.

Fields comprised in a farm were divided from one another by substantially built stone walls from five to six feet high, and the farm was bounded by similar walls. These walls served a double purpose—(1.) to divide up the land; (2.) to serve as shelter buildings for stock on the farm. In addition to the above-mentioned walls, short curved walls were built in the fields for the purpose of sheltering the stock. All the above walls were substantially built and if used for the purpose of boundary and division only would not have been required to be of such a substantial character. But for the walls it would have been impossible usefully to use the farm for the purposes of agriculture:—

Held, that the walls were not "buildings" or "structures . . . . appurtenant to or used in connection with any such buildings" within the meaning of s. 25, sub-s. 2, of the Finance (1909-10) Act, 1910, and that the owner was not entitled to have the land valued for the purposes of duties as if divested of the walls.

It is not the practice of the High Court upon an appeal from a decision of a referee appointed under the Act to deal with the costs of the proceedings before the referee.

Petition by way of appeal on the part of Walter Morrison against a decision of a referee appointed under the Finance (1909-10) Act, 1910, upon an appeal against a provisional valuation made by the Commissioners of Inland Revenue of a hereditament called the Penyghent Farm of which the appellant was the owner.

The farm was 2156 acres in extent, made up of the homestead, 47 acres of meadow, rough pasture 307 acres, moorland pasture 352, fell 1448, and was properly equipped as a farm in its particular surroundings. There were no growing fences on the farm.

The fields were divided from one another by substantially built stone walls from five to six feet high, and the farm was bounded by similar walls. These walls served a double purpose—(1.) to divide up the land; (2.) to serve as shelter buildings for the stock on the farm. The walls formed shelters for the sheep in the following manner:—During a snowstorm or

very heavy weather the sheep were driven behind the walls in the opposite direction to the wind, and the shepherds moved them from one side to the other according to the way the storm was beating. In addition to the above-mentioned walls, short curved walls called bealed walls were built in the fields for the purpose of sheltering the stock. These walls were built in the manner which it was thought would shelter the sheep from the most prevalent winds and storms in the district. All the above walls were substantially built and if used for the purpose of boundary and division only would not require to be of such a substantial character. But for the walls it would be impossible usefully to use the farm for the purposes of agriculture.

On April 23, 1913, the Commissioners duly served a provisional valuation of the farm on the appellant. The values shown in the provisional valuation were as follows:—

Original gross value	£8060
Original full site value	7110
Difference between original gross value and original full site value	950
Original total value (being the gross value less a deduction of £260 for tithe or tithe rent-charge)	7800
Original assessable site value	6850
Value for agricultural purposes	5700

Notices of objection to and appeal against the provisional valuation were duly given by the appellant.

Subsequently negotiations took place between the appellant and the Commissioners and the gross value was agreed at 7660*l.*, the total value at 7400*l.*, and the value for agricultural purposes at 5300*l.* if the value for sporting purposes ought to be excluded and at 7400*l.* if such value ought to be included.

The referee gave the following decision in the appeal.

(1.) The gross value should be the agreed sum of 7660*l.* instead of 8060*l.*

(2.) The total value should be the agreed sum of 7400*l.* instead of 7800*l.*

(3.) The sum of 950*l.* which represented the deductions from the gross value to arrive at the full site value and from the total

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value to arrive at the assessable site value was insufficient and should be 6460*l.* instead of 950*l.*

In arriving at the amount of 6460*l.* the referee included in it (*a*) the grass and heather and all things growing on the farm and (*b*) the farmhouse and farm buildings together with the walls enclosing the garden and fold-yard used in connection with the farmhouse and farm buildings respectively and also the outlying buildings on the farm consisting of a shooting hut and a lambing shed and a barn and cowshed on the part of the farm called Blishmere, but he did not include the drystone walls which formed the boundary fences of the farm and the division fences between the various enclosures of the farm. If these walls ought to have been included the above amount of 6460*l.* would have been increased by 700*l.*

(4.) The full site value should be 1200*l.* instead of 7110*l.*

(5.) The deduction for tithe rent-charge should be 260*l.*

(6.) The assessable site value should be 940*l.* instead of 6850*l.*

(7.) The value of the sporting rights is 2100*l.*

(8.) The value of land for agricultural purposes should be 5300*l.* instead of 5700*l.*

He made no order as to costs.

The appellant accepted the above decision in respect of the gross value, the total value, the deduction for tithe rent-charge, and the amount of the deduction which had been made to arrive at the full site value in respect of the subjects for which it had been made, and he accepted the decision that the value for agricultural purposes without the sporting rights being included was 5300*l.* and the value of the sporting rights was 2100*l.* He submitted that the decision of the referee was erroneous in the following respects and should be altered or varied because (inter alia) the walls were buildings or structures appurtenant to or used in connection with the buildings within the meaning of s. 25, sub-s. 2, of the Finance (1909-10) Act, 1910 (1), and

(1) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 25, sub-s. 1: "For the purposes of this part of this Act, the gross value of land means the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from incumbrances, and from any burden, charge, or restriction (other than rates or taxes) might be expected to realise."

should be deemed to be divested in arriving at the full site value, and because the value of the land for sporting purposes should be included in the value of the land for agricultural purposes within the true intent and meaning of Part I. of the Act of 1910.

As to the value of the sporting rights being included in the agricultural value he admitted that the point must be overruled in the King's Bench Division by reason of the decision in *Commissioners of Inland Revenue* v. *Hunter* (1), but desired to keep it alive for decision in the Court of Appeal.

H. F. Dickens, K.C., and *W. Allen*, for the appellant. The walls are buildings or structures appurtenant to or used in connection with buildings within the meaning of s. 25, sub-s. 2, of the Finance (1909-10) Act, 1910, and therefore the farm ought to have been deemed to be divested of them in arriving at the full site value. The walls are necessary for the working of the farm in order that the sheep on it may be sheltered from storms, and for the purpose of sheltering the sheep the walls take the place of farm buildings. They are used as an extension of the farm buildings. They are not temporary walls, but are substantially built, and as they are built they are buildings. An ordinary wall which would crumble at once would be as useless as a fence. In the ordinary interpretation of the word the walls are buildings, and there is no reason why a farmhouse should be treated as divested if these walls are not to be so treated. The purpose for which an erection is made is the important matter to consider in determining whether it is a building. An embankment may

Sub-s. 2: "The full site value of land means the amount which remains after deducting from the gross value of the land the difference (if any) between that value and the value which the fee simple of the land, if sold at the time in the open market by a willing seller, might be expected to realise if the land were divested of any buildings and of any other structures . . . . which are appurtenant to or used in connection with any such buildings . . . ."

Sub-s. 3: "The total value of land means the gross value after deducting the amount by which the gross value would be diminished if the land were sold subject to any fixed charges . . . ."

Sub-s. 4: "The assessable site value of land means the total value after deducting—

"(*a*) The same amount as is to be deducted for the purpose of arriving at full site value from gross value; . . . ."

(1) [1914] 3 K. B. 423.

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be a building for some purposes: *Long Eaton Recreation Grounds Co.* v. *Midland Ry. Co.* (1) *Lavy* v. *London County Council* (2) shows that each particular erection must be considered having regard to the function it performs. It is a question of fact in each particular case whether an erection is a building or not. One of the primary uses of a building is to give shelter, and the walls are built for the purpose of giving shelter to the stock.

The short curved walls were expressly built for the purpose of giving shelter and for that purpose alone. A wall built of bricks and mortar would probably be a building for whatever purpose it was built, but it certainly would be where it was built for the purposes of shelter, and the fact that these walls are built of stone makes no difference. A very wide meaning must be given to the words "or used in connection with any such buildings" in s. 25, sub-s. 2, of the Act of 1910, inasmuch as they follow the words "appurtenant to." It is not necessary to contend that the walls are "appurtenant to" the farm buildings, although there would be no difficulty in upholding that contention, but the walls are clearly within the words "used in connection with such buildings." The appellant ought to have his costs of the inquiry before the referee, who reduced the full site value from 7110*l.* to 1200*l.* The Court has jurisdiction to deal with the costs of the proceedings before the referee.

Sir S. O. Buckmaster, *S.-G.*, and *W. R. Sheldon*, for the respondents. The question is what is the meaning of the word "buildings" in s. 25, sub-s. 2, of the Finance (1909-10) Act, 1910. No light is thrown upon that question by decisions as to the meaning of the word in other statutes or in covenants. *Lavy* v. *London County Council* (2) turned upon the meaning of the words "building, structure, or erection" in s. 75 of the Metropolis Management Act, 1862, and *Long Eaton Recreation Grounds Co.* v. *Midland Ry. Co.* (1) upon the meaning of the word "building" in a restrictive covenant. In s. 25, sub-s. 2, of the Finance (1909-10) Act, 1910, the word "buildings" is used in a restricted sense. The buildings must be of such a character that other structures can be appurtenant to or used in connection with them. By "appurtenant" is meant something

(1) [1902] 2 K. B. 574. (2) [1895] 2 Q. B. 577.

that would pass by a grant of buildings and appurtenances. Therefore these walls scattered as they are over the farm cannot be buildings within the meaning of the section. Nor are they used in connection with buildings. The Finance (1909-10) Act, 1910, nowhere says that walls are to be deducted. If it had been intended that the land should be deemed to be divested of them the statute would have said so expressly. By the word "building" is meant something of the type of a dwelling-house. It is the nature of the structure which constitutes a "building." The buildings must be of a class to which something else is to be appurtenant. The walls are not buildings merely because they are used by the stock for shelter.

W. Allen replied.

ROWLATT J. In this case the question is whether the value attributable to certain walls ought to be included in the deductions from the gross value of the farm in order to arrive at the full site value upon the ground that the walls are buildings of which the farm ought to be deemed to be divested within the meaning of s. 25, sub-s. 2, of the Finance (1909-10) Act, 1910, or that they are "other structures . . . . appurtenant to or used in connection with any such buildings" within the meaning of the sub-section. The walls are used as boundary fences of the farm and also divide the fields on it. They are used very largely for the purpose of division, as appears from their being very much more numerous in the more important and fertile part of the lands on the lower ground. They also serve the purpose upon the higher ground of being a useful protection to the sheep in the case of storm, and there are some pieces of wall called beals which do not serve the purpose of division, but are pieces of wall erected in the middle of these rough pastures, apparently without any system, so that the animals can there find shelter.

The word "buildings" as used in s. 25, sub-s. 2, of the Finance (1909-10) Act, 1910, has, in itself, no limitation, and there is nothing in the section which shows what is meant, with the exception that after the word "buildings" it goes on to provide that other structures "appurtenant to or used in connection with any such buildings" shall also be exempt, and upon behalf

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ROWLATT J.

of the Commissioners of Inland Revenue the Solicitor-General contends that as s. 25, sub-s. 2, of the Act of 1910 speaks of them in the second instance as "such buildings," it shows that the Legislature meant by the word "buildings" buildings to which other structures could be appurtenant or buildings in connection with which other structures could be used. That appears to be the meaning of the sub-section, although the language used is not very artistic. It is quite clear that the expression "buildings" does not mean everything that can by any means be described as built; it means buildings in a more narrow sense than structures, because there are other structures of a limited class which under the terms of the sub-section may also be taken into consideration. In my judgment, as a more or less limited sense has to be placed upon the word "buildings,"—a sense limited in the direction which I have indicated—the only way to construe it is by looking at the nature of the property which is being dealt with. It is impossible to hold that the question whether a thing is or is not a building depends solely on the character of the workmanship that is put into it. There may be a very substantial wooden paling, which is not a building, but exactly the same character of work, if prolonged round a rectangle and continued at the top, would make a building—the same as if it were a shed. The character of the erection and the nature of the property on which it is and its function on that property must all be looked at. Take the case of a fives court. Suppose that apart altogether from his dwelling-house a person has a small piece of land which it is not easy to use in any other way, and he thinks he can turn it to a profitable use by erecting a fives court upon it, or by erecting on it something like a switchback railway. It seems to me that although the workmanship involved might of itself not necessarily make those things buildings, still there is an erection which he uses as an erection, and the land is put to the purpose of carrying that erection, and in that connection it would probably be said that that erection is a building upon that land. But in the case of a farm the question which must be considered is, in my opinion, what are farm buildings? That seems to me a straightforward and sensible way of construing the section.

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Rowlatt J.

It has been held by the Court of Appeal in *Waite's Executors* v. *Inland Revenue Commissioners* (1) that an earth embankment to keep out the sea from a farm is not a building, and the only difficulty which that case presents to me is the narrowness of its application, because an embankment is of course far away from anything which could be considered a farm building. The Court of Appeal had only to decide what was before them, and I do not think I can possibly say that that decision either binds me or even leads me to hold that a similar bank if made of stone—if it could have been made of stone, as I suppose it might—or with bricks and mortar would be a building. I think that the word "buildings" in relation to a farm means in s. 25, sub-s. 2, of the Finance (1909-10) Act, 1910, what one would ordinarily call farm buildings. If one were to say "this farm has very excellent buildings upon it," nobody conversant with farming language would suppose that one was talking about the stone walls which we have to consider in the present case, which run over the country to divide the fields, and also to shelter the sheep. I therefore do not think they are buildings.

Are they "other structures . . . . appurtenant to or used in connection with any such buildings"? The whole farm is used in connection with the farm buildings in one sense, but the words cannot mean that. What is intended to be described is a structure the use of which is immediately connected with the use of the building. All that can be said about the walls which we have to consider is that the sheep which shelter in the farm buildings strictly so called, when they go forth into the open country in the summertime, find a substituted shelter, if the weather happens to disappoint them, behind these walls. It may be suggested that if it were not for the walls on the hills the sheep could not be driven out of the buildings, but it seems to me an entire fallacy to suggest that that makes them walls used in connection with the buildings for this purpose. The sheep must have protection against a certain amount of cold. If they are not in the buildings they obtain protection from the walls, but I am utterly unable to see how there can be any connection between the uses of the two things in the sense required by the statute. The things are

(1) [1914] 3 K. B. 196.

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used alternatively and at different times for the same purpose, but that does not seem to me to indicate any connection between the two. I think that to be within the meaning of the statute some sort of subordination of one to the other is involved. In my judgment these walls cannot be said to be either appurtenant to farm buildings or used in connection with them merely because the sheep shelter by them. I therefore think the appeal fails.

It has also been contended that I ought to make some order about expenses or costs which the referee ought to have given to the appellant. I cannot do so. Orders of that kind are left to the referee, and I am certainly not going to initiate the practice of there being an appeal to this Division purely on the question of costs awarded by the referee.

The point which has been raised as to the sporting rights is not arguable here, but I decide it pro forma against the appellant. I therefore dismiss the appeal with costs.

Appeal dismissed.

Solicitors for appellant: *Royds, Rawstorne & Co., for Charlesworth & Co., Settle.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

J. E. A.

INLAND REVENUE COMMISSIONERS *v.* SHEFFIELD AND SOUTH YORKSHIRE NAVIGATION COMPANY.

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Jan. 26.

Revenue—Increment Value Duty—Minerals comprised in Mining Lease—Lease for Term not exceeding Fourteen Years—Liability to Duty—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 1, 22.

Increment value duty is, under s. 22 of the Finance (1909-10) Act, 1910, chargeable upon minerals comprised in a mining lease even if the lease is for a term not exceeding fourteen years.

APPEAL by the Commissioners of Inland Revenue from the decision of a referee under the Finance (1909-10) Act, 1910, upon the question of the liability of certain minerals to an assessment to annual increment value duty, under Part I. of that Act.

The minerals were comprised in a mining lease granted in 1909 by the respondents for the term of ten years from January 1, 1910. Increment value duty of 57*l.* was, in respect of the year 1912-13, assessed by the Commissioners upon the minerals comprised in the lease, under s. 22 of the Finance (1909-10) Act, 1910.(1) Against this assessment the respondents appealed

(1) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 1: "Subject to the provisions of this Part of this Act, there shall be charged, levied, and paid on the increment value of any land a duty, called increment value duty, at the rate of one pound for every complete five pounds of the value accruing after the 30th day of April, 1909, and—

"(*a*) on the occasion of any transfer on sale of the fee simple of the land or of any interest in the land, in pursuance of any contract made after the commencement of this Act, or the grant, in pursuance of any contract made after the commencement of this Act, of any lease (not being a lease for a term of years not exceeding fourteen years) of the land; . . . . the duty . . . . shall be collected in accordance with the provisions of this Act.

Sect. 22: "(1.) No reversion duty shall be charged on the determination of a mining lease, and no increment value duty shall be charged on the occasion of the grant of a mining lease or in respect of minerals which are comprised in a mining lease, or are being worked, except as a duty payable annually in manner provided by this Act. . . . .

"(3.) Increment value duty in respect of the increment value of minerals which are comprised in a

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upon the following ground: "As the term of the lease is for ten years only it is claimed that the lease comes within the exception contained in s. 1 (*a*) of the Finance (1909-10) Act, 1910."

Upon the hearing of the appeal before the referee, it was agreed that there was no dispute as to the figures, and that the sole question in issue was the question of exemption from duty. The referee decided that the lease in question, being for a term of ten years from January 1, 1910, came within the exemption, in s. 1 (*a*), of "a lease for a term of years not exceeding fourteen years of any land," and that therefore no increment value duty was payable.

The Commissioners appealed.

Sir S. O. Buckmaster, *S.-G.*, and *W. Finlay*, *K.C.*, for the Crown. Sect. 1 of the Act charges increment value duty on land and makes an exception in the case of a lease of land for a term not exceeding fourteen years. The words in s. 1, which specially except leases for a term not exceeding fourteen years, are not of general application, but apply only to leases of the surface land. A separate group of sections, ss. 20—25, deals specially and exclusively with minerals under a separate heading of "Mineral rights duty and provisions as to minerals." They introduce many differences between the assessment of ordinary land and the assessment of minerals. Sect. 22, sub-s. 1, provides that increment

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mining lease or are being worked shall, where that duty is chargeable, be charged annually; and the increment value shall, instead of being estimated as a capital sum, be taken to be the sum (if any) by which, in each year during which the lease continues or the minerals are being worked, as the case may be, the rental value on which mineral rights duty is charged in respect of the right to work the minerals exceeds the annual equivalent of the original capital value of the minerals, or the capital value of the minerals on the last preceding occasion on which the increment value duty has been collected otherwise than as an annual duty, if increment value duty has been so collected before the minerals have become comprised in a mining lease or have commenced to be worked; and the annual equivalent of any such capital value of the minerals shall be taken to be two twenty-fifth parts of that capital value. . . . .

"(5.) Increment value duty payable annually under this section shall, instead of being collected as provided by this Act in other cases, be recoverable in the same manner as mineral rights duty, with the same right of deduction."

value duty shall not be payable on the grant of a mining lease or in respect of minerals comprised in a mining lease or being worked, except as an annual duty; sub-s. 3 charges an annual duty upon the increment value of minerals and provides the mode of estimation; and sub-s. 5 provides for the collection of that duty. The subsequent sections provide a special method of valuation. There is, therefore, in the case of minerals comprised in a mining lease, a special code which charges an annual duty, in lieu of the duty payable upon "occasions" under s. 1, and makes no exception in the case of a lease not exceeding fourteen years.

Lowenthal, for the respondents. The only charge of increment value duty is contained in s. 1, and that charge is imposed by the whole of the section, the latter part of which is not merely a provision for collection of the duty. There is no other charge of this duty to be found in the Act; no charge of duty is imposed by s. 22. By s. 1 the duty is charged solely with reference to the three stated occasions, which apply to every lease not within the express exemption in favour of leases not exceeding fourteen years. In order to impose a duty there must be found clear words imposing the charge. There are no such words in s. 22. The whole operation of s. 22, in the case of minerals which would otherwise be chargeable upon "occasions" under s. 1, is to substitute an annual duty instead of the duty payable upon "occasions," and, as the duty is not charged by s. 1 upon leases not exceeding fourteen years, s. 22 does not affect those leases.

Sir S. O. Buckmaster, *S.-G.*, replied.

ROWLATT J. In my judgment this appeal succeeds. By s. 1 it is enacted that "there shall be charged, levied, and paid on the increment value of any land a duty, called increment value duty," and then it proceeds to state three separate occasions on which the duty shall be collected. The Solicitor-General has laid much stress upon the fact that the duty is first of all imposed in general terms with reference to the class of benefit which it is desired to tax, and says that the three specified occasions are only occasions of collection. That observation is fair enough, but I am not certain that it is much more than a

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question of words, because the duty which is payable on any of the specified occasions is a duty which is in substance charged, as opposed to being merely collectable by reference to that occasion, on the value of the property at that time. At any rate that is what is done by s. 1; the general charge of duty is imposed, and then the occasions when it is to be collected or charged—I do not care which we call it—are indicated.

Now, there is a group of sections, beginning with s. 20, which deals with minerals; and by s. 22, sub-s. 1, provisions are made with regard to reversion duty and increment value duty, which say that "no increment value duty shall be charged on the occasion of the grant of a mining lease." That operates, of course, upon the duty which would be charged, under s. 1, upon the grant of a mining lease of fourteen years or upwards. That is all it has to operate upon; not because "mining lease" means a mining lease of fourteen years or upwards, but because it is only in the case of such a mining lease that any duty is so far imposed, and it is therefore only in the case of such a lease that s. 22 has anything to operate upon when it says that no increment value duty shall be charged on the occasion of the grant of a mining lease. Then sub-s. 1 of s. 22 proceeds: "or in respect of minerals which are comprised in a mining lease, or are being worked." That means that, in respect of minerals comprised in a mining lease or being worked, no increment value duty is to be charged on any occasion. Then follow the words "except as a duty payable annually in manner provided by this Act."

The Solicitor-General says that the effect of that section is to do away altogether with the increment value duty on minerals, so far as it depends on "occasions," and to introduce a new code which is to be found in the subsequent part of the section. The respondents, on the other hand, say that s. 22, having regard to the exception in s. 1, retains the general charge of increment value duty in the case of minerals imposed by s. 1 and merely substitutes for the duty payable upon "occasions" a duty payable annually. Of course when we find a clause beginning with the word "except," just as when we find a clause beginning with the words "provided that," we do not expect to

find a substantive enactment in that clause. It is a very old saying that a proviso is not a substantive enactment. What we expect to find is that something is retained by that proviso which otherwise would have gone, not that something is introduced which has no independent origin of its own. That is, however, after all only a rule of correct language. The word "except," then, is in this case perhaps not used happily, but the general principle of taxing increment value is recognized and preserved in this section with reference to minerals, but the occasion, and to some extent its incidence, is affirmatively very much altered.

Let us now consider the substance of the matter and see how the two contentions work out. I must say that, if the words simply were "no increment value duty shall be charged on the occasion of the grant of a mining lease except as a duty payable annually in manner provided by this Act," I think there would have been a great deal of force in the respondents' argument, because then it could easily be said that what was meant to be done is this: instead of charging a lump sum at the date of the mining lease calculated upon the difference between the value at that date and the value at the time of the preceding relevant valuation, to charge a sum annually calculated on the rents paid by the lessee of the mines during the lease. There would have been no difficulty in doing that, and I think it would have been the most obvious and simple effect of the words if they had stood alone. We must, however, observe that the words "except as a duty payable annually in manner provided by this Act" apply not only to the taking away of the increment value duty on the occasion of a grant of a mining lease, but must also be applied to the enactment which takes away all increment value duty whatsoever on any occasion "in respect of minerals which are comprised in a mining lease or are being worked." I do not think that the argument for the respondents dealt with that difficulty. It is impossible to apply the exception so as to work out as a matter of commutation the duty chargeable on the occasion of a death or of a sale. I will take a death, which is the simplest possible case. A lease of minerals is granted and minerals are worked under it. The owner of the minerals, the subject-matter of the lease, the recipient of the rents, dies, and according to

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Mr. Lowenthal it is on the occasion of his death that increment value duty is payable, and it is said that it has now to be transformed into a duty based upon the rents during, I suppose, the remainder of the lease. The owner is dead and has ceased to have any connection with the property; the property may have passed anywhere under his will, or under a settlement, or to his heir. His executors have to pay duty to the Crown. Is it conceivable that the statute intended to keep an estate alive for the purpose of having a new duty assessed against a dead man during, perhaps, the remaining ninety-eight years of a lease with which he had long ceased to have any connection? It is unthinkable that that could have been the intention.

I have come, therefore, to the conclusion that s. 22, sub-s. 1, provides a new code for taxing minerals, by means of the tax called increment value duty, by sweeping away, in the case of minerals comprised in a mining lease, or being worked, the general charge imposed by s. 1, and in lieu thereof imposing a duty payable annually in manner provided by the Act.

Now let us read the remainder of the section and see how that works out, and whether it does not work out quite well. Sub-s. 2 of s. 22, to put it shortly, frees minerals which were comprised in a mining lease or being worked by the proprietor on April 30, 1909; and then sub-s. 3 says that "Increment value duty in respect of the increment value of minerals which are comprised in a mining lease or are being worked shall, where that duty is chargeable, be charged annually." That sub-section says "where that duty is chargeable," and this again is unfortunate drafting, for one would expect to find already existing in the Act an independent charge of that duty to which such words refer. Here, however, it is quite clear, in my judgment, that "where that duty is chargeable" merely means except in cases covered by sub-s. 2. Sub-s. 3, therefore, provides that, except in that case, the increment value duty shall "be charged annually," and then goes on to state how and with reference to what figure it shall be charged. In sub-s. 3 there is undoubtedly to my mind a charge. It is spoken of as a way of estimation, but it is so different a form of estimation that it really is the charge of a different duty.

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However, these are all mere questions of words. The broad question is, what is the scheme of s. 22, and for the reasons which I have given I think it means to do away altogether with the code which the Act had before set up and to charge in the case of minerals an entirely new kind of increment value duty, new in its calculation and new in the periods of its collection.

For these reasons I am in favour of the contention of the Crown, and I think their appeal succeeds.

Appeal allowed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Johnson, Weatherall & Sturt.*

J. H. W.

BRAKE *v.* INLAND REVENUE COMMISSIONERS.

1915

Jan. 26.

Revenue—Undeveloped Land Duty—Land "used bona fide for any business"—Land held by a Land Developer for his Business—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 16.

A person who in the ordinary course of his business as a land developer owns land which he divides into plots and advertises and sells does not "use" that land "for any business," within sub-s. 2 of s. 16 of the Finance (1909-10) Act, 1910, so as to be exempt from undeveloped land duty.

APPEAL from the decision of a referee under the Finance (1909-10) Act, 1910.

The appellant carried on, and had for many years carried on, the business of developing and dealing in land. That business consisted in the bona fide utilizing of his land in connection with his business by its development with a view to sale in accordance with the demands of the market for the time being, and with the aid of a continuous business system of advertisement and otherwise designed to attract purchasers. The land of the appellant was dealt with in accordance with that business system, but not otherwise used for his business.

Assessments to undeveloped land duty were made, under s. 16

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of the Finance (1909-10) Act, 1910 (1), in respect of many plots of land so belonging to the appellant in his business; and he appealed upon the ground that the land was not undeveloped land because it was used bona fide for his business of developing and dealing in land.

It was admitted that the appellant carried on the business of developing land, and that land developing as carried on by him is a business; but the referee decided that the land in question which the appellant had for sale was not "used" by him for his business, within the meaning of s. 16 of the Act, and that the assessments must therefore be maintained.

Cox-Sinclair and *Hynes*, for the appellant. The only reported case in which this question has been dealt with is *Allen* v. *Inland Revenue Commissioners* (2), where the same point was argued but

(1) The Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 16, sub-s. 2: "For the purposes of this part of this Act, land shall be deemed to be undeveloped land if it has not been developed by the erection of dwelling-houses or of buildings for the purposes of any business, trade, or industry other than agriculture (but including glass-houses or greenhouses), or is not otherwise used bonâ fide for any business, trade, or industry other than agriculture:

Provided that: . . . .

"(*b*) Where the owner of any land included in any scheme of land development shows that he or his predecessors in title have, with a view to the land being developed or used as aforesaid, incurred expenditure on roads (including paving, curbing, metalling, and other works in connection with roads) or sewers, that land shall, to the extent of one acre for every complete 100*l*. of that expenditure, for the purposes of this section, be treated as land so developed or used although it is not for the time being actually so developed or used, but, for the purposes of this provision, no expenditure shall be taken into account if ten years have elapsed since the date of the expenditure, or if after the date of the expenditure the land having been developed reverts to the condition of undeveloped land, and in a case where the amount of the expenditure does not cover the whole of the land included in the scheme of land development, the part of the land to be treated as land developed or used as aforesaid shall be determined by the Commissioners as being the land with a view to the development or use of which as aforesaid the expenditure has been in the main incurred."

(2) [1914] 2 K. B. 327.

it became unnecessary to determine it, and Scrutton J. said: "I was not impressed by this argument, which seems to me to be quite inconsistent with proviso (*b*) to sub-s. 2 of s. 16."

It is admitted that land developing, as carried on by the appellant, is a business. The land in question is used by him for that business just as much as the stock in trade, or samples, or apparatus of a trader are used for his business. It is not necessary that there should be a physical use of the land; the words "used for any business" are perfectly wide and general and will include this kind of use. Proviso (*b*) is in no way inconsistent with this contention; it simply confers a special exemption from the undeveloped land duty upon the owner of that particular kind of land because it would otherwise be undeveloped land within sub-s. 2 and chargeable with the duty.

Sir S. O. Buckmaster, *S.-G.*, and *T. H. Parr* (for *Raymond Asquith*, now serving with His Majesty's forces), for the Crown, were not called upon to argue.

ROWLATT J. The only question in this case is whether this land is "bona fide used for any business, trade, or industry." It seems to me to be too clear for argument that the use of land for any business, trade, or industry means the employment of the land as land. That means, of course, its physical employment, not because one reads in the word "physically" before "used" in the statute, but because the use of the land means the use of the land as land, and that brings in the idea of physical use. The use of it meant by the statute is not the use of it as a saleable article held in a condition in which, regarded as land, it is unused for business, trade, or industry, whether it is so held as a marketable commodity, or as a sample, or as serving any other ulterior commercial purpose.

For these reasons I think the appeal fails.

Appeal dismissed.

Solicitors for appellant: *Church, Adams & Prior, for Hollest, Mason & Nash, Farnham.*

Solicitor for the Crown: *Solicitor of Inland Revenue.*

J. H. W.

C. A.
1915
Jan. 16, 18.

[IN THE COURT OF APPEAL.]

GRIME *v.* FLETCHER.

Employer and Workman — Compensation — Suicide — Insanity — Evidence — Right of Dependant to Compensation — Time for taking Proceedings — Reasonable Cause — Prejudice — Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 2, *sub-s.* 1.

A workman who injured his eye by accident arising out of and in the course of his employment, suffered great pain from it, became depressed, and eventually committed suicide, cannot be held to have been insane without strict evidence that he was in that condition. In the absence of evidence of insanity as the cause of suicide that act will be treated as novus actus interveniens and his death will be held not to be the result of the accident.

Where notice of an accident under the Workmen's Compensation Act, 1906, has been duly given by an injured workman who subsequently dies, no further notice of the accident need be given by his dependants; and where notice has not been given as soon as practicable by the workman the omission cannot be cured by subsequent notice given by his dependants.

Appeal from an award of the judge of the Chorley County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The workman, Grime, had been in the employment of Mr. James Fletcher, a cotton manufacturer, for thirty-four years and had risen to the position of chief mechanic in the factory. He was much interested in and very regular at his work, was a married man with a good home but no children, and had saved some money. On December 4, 1913, he was grinding a pick joint and a small iron splinter went into his eye. One of his fellow workmen pulled out part of it, and in the evening he went to see his own doctor, Dr. Macintosh, who did not think the injury serious. He went on working, but suffered great pain in his eye, and on December 19 he went to see an eye specialist, Dr. Richardson, at Preston, who performed the operation of scraping rust off it, and advised him to give up work for a time lest he should lose his eye. Grime returned home in great distress. The next morning he went to work as usual about 5 a.m., but took with him a revolver which had belonged to his

brother-in-law and had been kept in his house for some years without being used. He did his work as usual and started the machinery; and at about 7.15 A.M. he was found dead, shot in the head, with the revolver in his hand. He had given his employer no notice of the accident, but on December 23 his widow gave notice and claimed compensation. A coroner's inquest was held and the jury found that Grime committed suicide whilst in a condition of temporary insanity. On the widow's claim coming on for hearing the learned judge found that there was evidence of insanity, that this was the result of the accident on December 4, that the accident arose out of and in the course of the employment, and he awarded to the widow 300*l.* He also held that there was reasonable cause for Grime's omission to give notice and that the employer had not been prejudiced by the want of notice.

The employer appealed.

Rigby Swift, K.C., and *Adshead Elliott*, for the appellant. There are two questions raised on this appeal, namely, first whether the death of Grime was the result of the accident, and secondly whether the absence of notice by the deceased is fatal to the claim. There is no doubt that the death was caused by suicide, and it is clear that that suicide can only be the result of the accident if it is proved that it was itself due to insanity caused by the accident. It is submitted that there was no evidence of insanity, and that alone is sufficient to ensure the success of this appeal. A new feature—the act of suicide—has intervened, and the chain of causation is broken: *Malone* v. *Cayzer, Irvine & Co.* (1) Evidence on which a coroner's jury might find temporary insanity is not necessarily sufficient; the fact of insanity must be properly proved: *Southall* v. *Cheshire County News Co.* (2); *Hawkins* v. *Powells Tillery Steam Coal Co.* (3) The fact that the deceased committed suicide is not evidence of insanity. If he had killed some one else no tribunal would have acquitted him on the ground of insanity. His state of health was not incapacity caused by the accident: *Holt* v. *Yates & Thom.* (4)

(1) (1908) 1 B. W. C. C. 27.
(2) (1912) 5 B. W. C. C. 251.
(3) [1911] 1 K. B. 988.
(4) (1909) 3 B. W. C. C. 75.

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Secondly, no sufficient notice of the accident was given to the employer. Under s. 2, sub-s. 1 (1), of the Act of 1906 notice of the accident has to be given "as soon as practicable after the happening thereof." Here the deceased went on working for a fortnight without giving notice, and it is impossible to say that the employer was not prejudiced. He had no opportunity of having the man examined by his own doctor. There was no reasonable cause within s. 2, sub-s. 1 (*a*), (*b*), for not giving notice. The onus of proof of these points is on the applicant: *Dalgiesh* v. *Gartside* (2); *Hayward* v. *Westleigh Colliery Co.* (3)

W. Shakespeare, for the respondent. There is evidence that the mind of the deceased was reduced to such a state that he was no longer responsible for his actions, and that that condition was caused by the accident. The act of suicide in such circumstances is itself some evidence of insanity, though not conclusive evidence. The only question is whether the conclusion of the learned county court judge was "such as a reasonable man could reach": *Lendrum* v. *Ayr Steam Shipping Co.* (4) In that case all the Lords thought they were reasonable men, yet they differed in opinion. That shows how difficult it is to say that any man's decision is such as a reasonable man could not have arrived at. On the facts the present award was justified.

(1) Workmen's Compensation Act, 1906, s. 2, sub-s. 1: "Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death:

"Provided always that—

"(*a*) the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings if it is found in the proceedings for settling the claim that the employer is not, or would not, if a notice or an amended notice were then given and the hearing postponed, be prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake, absence from the United Kingdom, or other reasonable cause."

(2) (1914) 7 B. W. C. C. 535.

(3) (1914) 7 B. W. C. C. 53.

(4) (1914) W. C. & Ins. 438.

On the question of notice a dependant is in a different position from the workman and has an independent right to give notice of a claim. Here the widow gave notice as soon as practicable within s. 2, sub-s. 1. Her compensation became due from the employer the moment her husband died but not before: *United Collieries* v. *Simpson.* (1) The fact that the deceased did not give notice during his life does not affect the rights of his dependants. The word "practicable" in s. 2, sub-s. 1, means practicable for the dependant: *Tucker* v. *Oldbury Urban District Council.* (2) At all events the delay was due to a reasonable cause within s. 2, sub-s. 1 (*b*), and the employer has not been prejudiced within s. 2, sub-s. 1 (*a*): *Breakwell* v. *Clee Hill Granite Co.* (3); *Eaton* v. *Evans.* (4)

No reply was called for.

LORD COZENS-HARDY M.R. This is a case which has been argued with very great ability on both sides, and it raises a question of considerable importance, although in the event one of the most interesting points will not arise for decision, namely, what is the effect of insanity upon a claim under the Workmen's Compensation Act; in fact, whether there can be a claim under the Workmen's Compensation Act when insanity is proved, and there is a novus actus interveniens. I do not propose to deal with that, for this reason, that I think there was no evidence to justify the finding of insanity by the county court judge. I further think, although this part is really not necessary to our decision, that the respondent fails on the ground that notice was not given within reasonable time. [His Lordship stated the facts and continued:] The learned judge had before him the evidence of several doctors. I am afraid it is true down to the present day that there is a great difference between the legal and medical professions on the subject of insanity. Some of the witnesses who were called took the view that the fact that a man commits suicide is in itself evidence that he is insane. That of course is quite hopeless; it would go to show that there never could be a criminal offence in suicide. Attempts to commit

(1) [1909] A. C. 383.
(2) [1912] 2 K. B. 317.
(3) (1911) 5 B. W. C. C. 133.
(4) (1911) 5 B. W. C. C. 82.

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suicide come before criminal Courts in many forms, and it is idle to say in a Court of law that the fact that a man shoots himself with intent to kill himself is evidence of insanity. It is nothing of the kind. Then it is said, although that may be true, still if you find that a man is a man of deep religious convictions in whose eyes it would be a sin to commit suicide, you may come to the conclusion that he was really out of his mind. I should be slow to admit that; however, there is not a particle of evidence of this man's religious convictions of any sort or kind.

Again it is said, he was a respectable man, thirty-four years in the employment, earning good wages, had saved a little money, had lived happily till the accident; add that to the fact of suicide, and that alone is sufficient to support the view that this must have been insanity.

Further it is said, the injury to the eye which he undoubtedly suffered, and the pain it caused, made him worried with pain and suffering, and that turned his mind, it may be, at the last moment, the moment on the morning of the day when he committed suicide. Again it is said on this question of medical opinion that the statement of one, possibly of two, of the various doctors who were called is evidence of a fact upon which the Court ought to rely. The answer is that it is merely evidence of opinion at most; it is an opinion not based upon definite facts. It is a mere matter of opinion which the Court having to deal with it must deal with as best it can. I think it is the duty of the Court in cases like this to see whether there is a scintilla of evidence, or that which can be called evidence, to justify the finding of the judge. The learned county court judge says he had great difficulty in coming to a decision; he intimated that he had considerable doubt as to whether another tribunal would not take a different view from himself, but he held there was sufficient to entitle him to come to the conclusion, partly by what was supposed to be evidence and partly by inference, that this man was out of his mind when he committed suicide.

In my opinion this is a case in which it is the duty of the Court to see whether there was any evidence to justify the finding of the learned judge, including in the term "evidence"

whether there was anything to justify a legal presumption that there was insanity. Without going through the evidence again, all the facts seem to negative that contention. If, for instance, this man had merely wounded himself and he had been brought up for the offence of attempting to commit suicide, can any human being really doubt that he must have been bound over? It seems to me he could only have been bound over if he had been of sane mind. We have the fact of his going out of the house and for the first time taking down this old revolver, going to his work in the morning, doing what was necessary before 6 o'clock, doing it apparently quite in the ordinary way, then going a certain way off and deliberately shooting himself.

In my opinion there is nothing to justify the finding of the learned county court judge on this point, nor, unless we are to decide by guess, or surmise, is there anything to justify us in arriving at the conclusion that this man was in fact out of his mind. I should come to the conclusion if I had to guess, which I have not, that he was influenced by what some of the witnesses called cowardice, that is to say he could not bear the pain and could not certainly bear what he apprehended would be the consequences of the bad eye, of which apprehended consequences he had only been informed the evening before. Insanity is a matter you cannot presume, you must have evidence. On that ground, which is sufficient to dispose of this case, I think the appeal succeeds, and the learned judge's judgment cannot be supported.

But then there is another point not without interest and importance. It is this: What are dependants to do where there is an accident which has resulted in the death of the workman? It has been contended by Mr. Shakespeare that there is no foundation for the ground of appeal which says that no proper notice was given of the accident and that it has not been established by the applicant that the employer was not prejudiced.

Now the accident occurred, as we know, on December 4. The evidence of the dependants goes to show first that he saw his doctor on that day, that from December 4 to the end of December 19 he was suffering a good deal of pain from his eye. One witness says he was "mad with pain," that he became very

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depressed in spirits—not the sort of man he worked with before. Then what is the reason why no notice of the accident was ever given by the man to his employer? Mr. Shakespeare says this is an independent right of dependants, and they are not to be affected by any want of notice which may be found true as against the man himself. His argument involves this, that the whole of the provisions of s. 2 of the Workmen's Compensation Act, 1906, have no application to the case of a claim by dependants as distinguished from a claim by the workman. That is a startling proposition to impose on employers, a risk far greater than I believe is contemplated in any part of the Act. No doubt in the case of death a new and independent right is given to the dependants. Sect. 2 of the Act is perfectly general: "Proceedings for the recovery under this Act of compensation for an injury"—it does not merely say by workmen or dependants, but any "proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof." In a case where the notice of accident has been given by the workman as soon as practicable in writing and no default of that kind happens, and then before the matter comes on for hearing the man dies, it seems to me really too plain for argument that no further notice of accident need be given by the dependants. The section only provides that notice of the accident shall be given, but it does not say by whom, whether by the man himself or by the dependants; it is by one or other of them—notice of the accident must be proved to have been given as soon as practicable. Unless s. 2 is applicable to dependants equally with the injured man there can be no reason for requiring the limit of six months—"unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death." Those words seem to show expressly that dependants are within the language, meaning, and intent of the section as to notice. Assuming that to be so, there was no notice given of the accident by the man himself. Nineteen days afterwards notice was given by the dependants' solicitors; but that does not get over

the objection that from December 4 to 20, that is getting on for three weeks, no notice of the accident was given to the employer, although the man had consulted his doctor on the 4th, and although he felt so bad that he went to see a specialist on the 19th. Is there any reasonable excuse for that? I can see no ground for saying there is any reasonable excuse whatever. Has it been proved that the employer was not prejudiced by the man not giving notice? In my opinion not a particle of evidence has been given to that effect.

For these reasons I think that even if a different view may be taken on the question of there being evidence of lunacy, still the application must fail on the ground that the provisions of s. 2 of the Act are fatal to the application. For these reasons the appeal must be allowed with costs.

SWINFEN EADY L.J. I am of the same opinion. The first question is whether there is any evidence from which the county court judge could come to the conclusion that there was any insanity. The whole of the evidence has been read and part of it commented upon more than once, and I can find no evidence from which the county court judge could come to the conclusion that the man was insane. The evidence consists, first, of two fellow employees, Worsick, and Collinson the overlooker. Worsick said that he saw nothing wrong with him except severe depression; he brooded over the state of his eye. Collinson, the overlooker, said that after the accident he did his work but he was worried; he seemed right in his mind otherwise. The man was no doubt depressed and worried as the result of the accident. Then the wife was called. She gave no evidence of insanity; she does use the phrase "mad," but in connection with being mad with pain, that is to say, suffered great pain; as Mr. Rigby Swift put it, as a person might say "mad with toothache." It is a colloquial expression and does not mean insanity, but that the pain is great. Then two doctors were called. Dr. Macintosh spoke only of depression; pain in the eye is known to cause severe depression and insanity. Then he said the severe pain affected his mind, which caused him to become temporarily insane, and there is no other reason he can suggest

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for suicide. Then when he is cross-examined his evidence really comes to this: "The ground upon which I consider he was temporarily insane was that he committed suicide," and that is apparently the only ground that he gives for presuming insanity. He said, "I believe a man who commits suicide for no ostensible or adequate cause is insane." Then Dr. Richardson, who only saw him once, when he removed the rust from his eye, said "I had no reason to question his sanity." When he saw him, he examined him and he did not form any opinion that he was insane and he knew of no reason to question his sanity, and when he heard of the suicide he was surprised. With regard to the suicide he does not speak to any facts from which the state of the man's mind can be inferred, or from which any proper inference can be drawn that he was insane. But he says, "I attribute the suicide to the pain caused by the accident and the worry and depression and probable loss of work, and that he either would or could not stand it further." Then he adds this: "A man of the character of the deceased would not commit suicide without cause or temporary mental derangement," and that he knew of no cause. When the doctor says he would not commit suicide without cause he obviously means he would not commit suicide without what to the man himself seemed sufficient cause. That may be; that is not an indication of insanity. The truth is that the man apparently, although in some pain, did not consider that he was prevented by the accident from doing his work; he attended to the work right up to almost minutes before his death. The accident having happened on December 4, it was not until the 20th that he committed suicide. From the 4th to the 19th he remained attended by his own doctor, suffering from some sleeplessness, and wearing a shade over his eye; but he habitually attended to his work during the ordinary working hours, and no one then says they observed any symptoms of insanity. On the 19th he saw Dr. Richardson, who said it was possible he might lose sight of the eye, and he became depressed. He attended to his work the next day in the ordinary way in the morning, although he had provided himself with an old rusty revolver which belonged to a relative. The revolver had remained in the house, but he had not been in the habit of carrying it about on

his person; he provided himself with it on the morning of the 20th, and after starting his engines and seeing everything was in order, between five and ten minutes past 6 o'clock—which is the last time he was actually seen—he appears to have gone out and committed suicide, his body having been found at half-past 7. Really the only fact here is the suicide, and, from that alone, the inference cannot be drawn that the man was insane when he committed suicide. Quite rightly no reliance was placed upon the finding of the coroner's jury in this matter. It is common knowledge that coroners' juries take a compassionate view of such cases, the effect of which is to ensure Christian burial.

For these reasons I am of opinion that the judgment which the county court judge gave, and which he said he gave with great hesitation, was erroneous on this point, and there was no evidence of insanity.

Then with regard to the other question as to the notice, I agree with the view just expressed by the Master of the Rolls. No notice was in fact given of the accident; that is common ground. The judge below finds no notice. He first says, in answer to that, that the employer was not prejudiced. It does seem to me that this is particularly a case in which, although there was no evidence that he was not prejudiced, the inference is the other way, that the employer may have been considerably prejudiced. In the first place the man continued at his work and was not seen by any doctor of the employer. It may well be that if he had been seen at once he would have been advised to refrain from coming to work while his eye was bad and to remain in a dark room as he could not bear the light of the weaving shed. It may be some advice of that sort would have been given, his employer agreeing to pay his wages, because he was obviously an old and faithful servant. Again the employer might well have relieved his mind from the idea that he was going to lose his work; that again is a matter which seemed to have pressed upon him, and if his employer had had notice of his accident it might well have been that he would have relieved his mind on this point and the unfortunate occurrence that ultimately took place might not have happened.

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The county court judge further stated that if there was no evidence that the employer was not prejudiced, that is to say, if he was wrong in finding that the employer was not prejudiced by the want of notice, he held that there was reasonable ground for not giving notice of the accident before he was attended by the second doctor, the day before the suicide, as the first doctor thought it was a trifling matter and that the eye would soon become well. In the early part of the judgment, however, the learned judge referred to the great pain the man suffered; to the fact that he was not able to sleep; that depression ensued with the fear that he would not be able to do his work, and so on; it is inconsistent with this view to hold that there was reasonable ground for excusing the man from giving notice on the ground that the accident was trivial.

In my opinion there was no evidence to show either that the employer was not prejudiced nor any evidence of reasonable ground of excuse for not giving notice; and on this point also I am of opinion that the county court judge was wrong and the appeal should be allowed.

PHILLIMORE L.J. I agree. The applicant in this case, the dependant of the deceased workman, set out to prove that his death resulted from an injury which he sustained by accident arising in the course of his employment and out of it. To do that she offered evidence that the man while working had an accident arising out of and in the course of his employment, and an injury to his eye from that accident. She then proceeded to contend that the injury to the eye produced either mentally or physically, that is to say, either by operation of mental causes or by in some way physically affecting the material of the brain, insanity so as to make the man insane and not accountable for his actions, and that in and by reason of that insanity he took his life. The employer met that chain of argument at a comparatively early stage and said that the man never was insane. The county court judge thought that he was, but we are of opinion that there is no evidence that he ever was. It becomes, therefore, unimportant for this case to consider the nevertheless extremely important point whether there can be

any connection between insanity of this description and the consequences of that insanity at the one end, and the injury by accident at the other end of the chain.

Now why do we say that there is no evidence that this man was insane? Because all the circumstances point to the fact that rash (which is a common expression) and wrong as was the act, it was, nevertheless, not the act of an insane person. There was no doubt an injury. He was prevented from doing one small part of his work, he could not bear light, he had discomfort and pain, and it may be—though one is not very certain about that—that comparatively early he began to fear that he would not be able to go on with his work. Certainly after his interview with a specialist he suffered more pain and he had more ground for depression because he was told unless he saved himself his sight might be permanently impaired, and that he ought not to prefer his work to his eye. But be it so, the evidence is that this depression either increased or came on after that interview with a specialist. It was depression—I will not use the word cowardice—but some inability to be patient of pain. One is very sorry for him, but he was depressed because he could foresee the loss of his employment where he had been for years and where he had risen to a very good position. But those are motives which may influence a man, who is not deterred by other considerations, to put an end to a life which he might consider no longer to be pleasurable or profitable. If the man had been a devout Christian one would hope and believe that his duty towards his God would have overborne those considerations. There is no evidence about that matter at all. The strongest thing that can be said is that the doctor who knew him describes him as one of the finest men in Chorley and one he should have thought very unlikely—or some such phrase as that—to take his life. I think that does not mean very unlikely on account of religious belief, but that he would be a man who set his teeth and endured pain and would not take such a step as this. That is the strongest evidence there is of the man having been insane. On the other hand, all his acts are purposeful and with motive. It is not as if this was a case of automatic impulse, as if the man had been on the edge

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of a railway platform and just before the train was coming in hurled himself down, where one might almost consider the case as automatic. This is a case where the man has deliberately selected a revolver which he was never known to carry before, carried it about with him for hours, done his ordinary duty to his employer, showed conscience and conscientiousness in that, and then with a very deliberate act put an end to his life. In my view there is no case of insanity here, and it would really come to that which Mr. Shakespeare at one moment suggested as a proposition—a proposition in the direct teeth of the common law of this country—that every case of suicide was to be presumed, if not concluded, to be evidence of insanity. I say no more upon that point.

As I have said, the second point does not arise, because the employer stopped the chain of causation.

With regard to the notice which was not given. It seems quite clear the employer may well be prejudiced by the want of notice for reasons already stated.

The only matters that remain are whether there was any excuse by virtue of the words "other reasonable cause" or whether this clause applies to claims by dependants for the death of the workman. With regard to the "other reasonable cause" the arguments of the respondent seem to contradict one another. If there was anything like motive for this man taking his life, or at any rate, before the last day, if we are to rely on the continued pain and the continued depression on many days before, it is obvious that this was a serious injury of which the man ought to have given notice. If it was not a serious injury then there was no ground for the rash act which he eventually did. Apart from that and apart from that class of argument, it seems clear that this injury was a serious matter, or one that might be a serious matter, upon which the dead man had to consult his doctor, and the seriousness of which increased from day to day. Without saying that he ought to have given notice on December 5, 6, or 7, the accident having been on the 4th, it seems clear that he ought to have given it long before December 19 or 20.

Then the only matter that remains is the bold contention that this clause does not apply to claims by dependants. On the face

of it it applies to cases where the injury produces death. I should have thought that was of itself answer enough. Moreover it is a general clause requiring, as Lord Loreburn says in the case of *United Collieries* v. *Simpson* (1), the fulfilment of certain conditions precedent not to the right but to the relief. It is carefully put and wisely put in the impersonal form. It does not say that the dependant is to give notice, but notice of the accident has to be given as soon as practicable. The dependant may give it, the injured man may give it. If he is dead or dying or incapable it may be given for him either by the dependant or, I presume, by somebody else. If he dies immediately the dependant may of course give it in his or her own right. But it is just as much a clause requiring notice of the accident as soon as practicable as a clause requiring a claim within six months after the accident or six months after death as one of the conditions precedent to recovery under the Act; and it must be satisfied, whether it be a claim by the dependant or a claim by the workman, unless excused.

For the reasons I have already dwelt upon, therefore, I think this appeal should be allowed.

Appeal allowed.

Solicitors: *Rawle, Johnstone & Co., for John Taylor, Blackburn; D. M. Aspden, Chorley.*

(1) [1909] A. C. 383.

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[IN THE COURT OF APPEAL.]

SILCOCK & SONS *v.* GOLIGHTLY.

Employer and Workman—Injury by Accident—Loss of Right Arm—Compensation—Weekly Payment—Application to review—Ability of Workman to do Light Work—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (3.), (16.).

In 1909 a workman lost his right arm in consequence of an accident arising out of and in the course of his employment and received compensation from his employers under the Workmen's Compensation Act, by way of a weekly payment. In 1914 the employers applied for a review of the weekly payment on the ground that the man was able to do light work. Apart from the loss of his arm he was a strong healthy man and not totally incapacitated from earning wages. He had applied once, in 1909, to his employers for light work, which they were unable to give him, and he had since made no effort to get work of any kind. The employers did not adduce any evidence to show what particular kind of light work he could do, nor that he could get such work, but they suggested various kinds of work which were open to him in the place where he lived. The county court judge, acting upon his own experience and knowledge of the locality, came to the conclusion that there was open to the man a field of employment, though a restricted one, and that he could get work if he tried; he accordingly reduced the weekly payment:—

Held by the Court of Appeal, that the county court judge was right.

Proctor & Sons v. *Robinson* [1911] 1 K. B. 1004; *Cardiff Corporation* v. *Hall* [1911] 1 K. B. 1009; *Anglo-Australian Steam Navigation Co.* v. *Richards* (1911) 4 B. W. C. C. 247; and *Carlin* v. *Stephen & Sons*, 1911 S. C. 901; 5 B. W. C. C. 486, are hard to reconcile.

Appeal from an award of the judge of the Liverpool County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The appellant met with an accident while in the employ of the respondents in 1909, resulting in the loss of his right arm. He was then under age and was paid compensation at the rate of 10*s.* a week until 1911, when he attained twenty-one years of age and the weekly payment was increased to 11*s.* In June, 1914, the respondents applied for a review on the ground that the applicant was able to do light work. The evidence showed that apart from the loss of his arm the appellant was a strong healthy man and was not totally incapacitated from earning wages. In 1911 he

married a woman who earned 15*s.* a week as a hawker. He was in the habit of carrying baskets containing pigeons for his brother-in-law, but he had never done any work since his accident, and had only once, in 1909, made any attempt to get employment. In that year he had applied to the respondents for light work which they were unable to give him. Since that time he had made no effort to get work of any kind.

The respondents did not in support of their application adduce any evidence to show what kind of light work he could do, nor that there was a reasonable chance of his getting any such work, but they suggested that he might get employment in Liverpool, where he lived, as a watchman or messenger or in some other kind of light work open to a man who was deprived of the use of his right arm.

The county court judge, relying upon his own experience of what could be done in Liverpool, thought that it could not be said that a man who apart from the loss of his arm was otherwise physically fit, who was young and in good health, was not capable of getting employment. Taking into account that there was open to him a field of employment, though a restricted one, the judge reduced the amount of the weekly payment to 7*s.* 6*d.*

The workman appealed.

G. C. Rees, for the appellant. The county court judge was wrong in reducing the weekly payments in this case. The employers have not shown what particular light work the man can do and have given no evidence that he has a reasonable chance of obtaining that particular light work. Under these circumstances there ought not to be any reduction: *Proctor & Sons* v. *Robinson*. (1) It is true that in *Cardiff Corporation* v. *Hall* (2) this Court held that there had been a change of circumstances in the workman's capacity for work which justified a reduction, but here there has been no change of circumstances between 1909 and the present time.

The county court judge ought to have stopped the case: *Turner* v. *Bowley*. (3)

(1) [1911] 1 K. B. 1004. (2) [1911] 1 K. B. 1009.
(3) (1896) 12 Times L. R. 402.

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A. R. Kennedy, for the respondents. The policy of the Act as recognized by this Court is to encourage workmen to return to work, and not to assist them in leading a life of idleness: *Carlin* v. *Stephen & Sons*. (1) The evidence shows that the man is capable of doing some light work.

[LORD COZENS-HARDY M.R. May it not be said that he has become an "odd lot" in the labour market?]

The workman in *Proctor & Sons* v. *Robinson* (2) was more seriously incapacitated than this man.

Although there is no evidence as to the particular kind of light work which the appellant can do and as to his chance of getting it, there is evidence to show that he has made no serious attempt to get employment, and the county court judge was justified in coming to the conclusion from his own experience and local knowledge that there was a field of work in Liverpool in which the man could get suitable employment if he tried; and he was right in reducing the weekly payment in order to put pressure on the appellant.

The case is covered by *Anglo-Australian Steam Navigation Co.* v. *Richards* (3), where the Court was constituted as it was in *Cardiff Corporation* v. *Hall*. (4)

G. C. Rees in reply. In *Anglo-Australian Steam Navigation Co.* v. *Richards* (3) there was medical evidence that the appellant could do light work. There is none here. The onus is upon the employers to adduce evidence upon which the Court can act. The mere failure to try and get work by a man in this position may be wrong morally, but it is not a legal answer to his claim.

In *Cardiff Corporation* v. *Hall* (4) the man could do any ordinary light work, but could only do it imperfectly. Here the appellant can only do some particular kind of light work, and the onus is upon the employers to show by evidence what particular kind of light work he can do, and that there is a reasonable probability of his getting such work.

LORD COZENS-HARDY M.R. This is an appeal from a decision of the learned county court judge, who has reduced compensation

(1) 1911 S. C. 901; 5 B. W. C. C. 486.
(2) [1911] 1 K. B. 1004.
(3) 4 B. W. C. C. 247.
(4) [1911] 1 K. B. 1009.

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payable in respect of an admitted accident from 11*s.* a week to 7*s.* 6*d.* a week.

That the man met with an accident when he was employed is quite clear; he lost his right arm, and compensation has been paid for a long time. The employers seek to review and they say the man comes into Court, the judge sees him, he is a young man, he is a strong man, he is a healthy man; and from the evidence which was brought before the learned county court judge at Liverpool it was quite clear that not merely on one occasion, but on several occasions,—I think it must be taken frequently—he walks about and carries baskets of pigeons belonging to his brother-in-law and to himself. It is not the case of a man who is physically weak and unfit; it is the case of a man who, but for the loss of an arm, would be apparently young, vigorous, and able-bodied.

What has happened since 1909—that is five years ago—is that he has not only done no work, but he has not even sought for any work to do; he has not applied or answered any advertisements or made application at all for work. I think it is really a bad case of malingering. But although those are circumstances we cannot disregard, it is not conclusive, of course, of the case. The real difficulty which I think we have all felt—certainly I have felt—in the case is by reason of the authorities on this branch of the law, which I feel cannot easily be reconciled. There are three cases: *Proctor & Sons* v. *Robinson* (1), *Anglo-Australian Steam Navigation Co.* v. *Richards* (2), and *Cardiff Corporation* v. *Hall.* (3) It so happens that they were all tried before the Court constituted in the same way; I was a dissentient in one of the decisions, the *Cardiff Case.* (3) They are all decisions of the Court of Appeal. I should be glad if the ultimate tribunal could have the opportunity of settling the law on this branch of the case.

It is said by counsel for the appellant that malingering had nothing to do with the present case, and that there is no ground for reducing the compensation unless it is shown not only that the man was able to do some sort of work, but that there is some

(1) [1911] 1 K. B. 1004. (2) 4 B. W. C. C. 247.
(3) [1911] 1 K. B. 1009.

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particular kind of work which he is able to do, and which there is a reasonable prospect of his being able to obtain in the neighbourhood. On the other hand it is said that this is a case in which the learned county court judge has great local experience, that Liverpool is a place where employment in shipping industries and other kinds of employment are to be found, and that the judge is entitled to take advantage of his own local knowledge, and is not bound to require evidence to satisfy himself that the man—who has never tried to get suitable work—might have got it if he had tried.

On the whole I have come to the conclusion that we cannot interfere with the decision of the learned county court judge. I think that he was entitled to take advantage of his own local knowledge, and to say that although this man has only his left arm he is not so disabled from earning anything that he should be allowed to be a pensioner for life, receiving 11*s.* a week from his employers, having the good fortune to have a wife who is earning 15*s.* a week, and so to live in comparative ease on an income of 26*s.* a week doing nothing. I think we ought not, really, to encourage such conduct, and I think the learned judge was justified in saying that from his local knowledge he was satisfied that this was a man who was able to obtain light work in Liverpool if he wished to try.

Of course, on some future occasion, if he should in the meantime have made attempts—honestly and in good faith and extensively—and found himself unable to obtain any light work suitable for his infirmities, then it may be open to him to apply for, and it may be competent for the learned judge to grant, an increase from the 7*s.* 6*d.* a week to the 11*s.* But I cannot say that we are bound by the authorities which were cited to us to hold that there was no evidence in this case of the man's physical condition and capacity; and that, coupled with the judge's local knowledge, is sufficient to maintain the award. For these reasons I think the appeal fails and must be dismissed.

SWINFEN EADY L.J. I am of the same opinion. This is a case of a man who six years ago met with an accident. He was then a minor; he has since become of full age, has married, and has

one child. Apart from the loss of his arm he is otherwise a strong healthy man. He lives with his wife, and the evidence is that he assists his brother-in-law with his pigeons. His brother-in-law keeps pigeons, and he carries them out and releases them as occasion may require. On one occasion an officer saw him taking the pigeons to Stanley Road and releasing them there; on another occasion he saw him carrying them in a basket to Birkenhead. His own evidence is that his brother-in-law keeps pigeons, and that he takes them out sometimes. He says he walks about in the market like anybody else. He has not done any work. He has not attempted to obtain any work; and the proper inference to draw from his evidence, and the inference which the judge drew, was that the man has made no effort to get employment. The man himself said that he had only applied for work to his former employers, Messrs. Silcock & Sons, before August, 1909. He has not looked at any advertisements. He says "I made no attempt to get work, and when Silcock & Sons would not employ me I do not see how other firms will employ me." I think this may be said in the man's favour, that he is a temperate man, he does not frequent public-houses. The officer who gave evidence said he was steady, and that he had never even seen him go into a public-house. He is a man of some education; he could write with his right hand, and now he can write to some extent with his left hand. The judge saw him, and having regard to the facts proved and to his own local knowledge the judge says "I am entitled to believe my experience of what can be done," and he comes to the conclusion that the man is capable of obtaining work—that is to say, the kind of light work suggested as being open to him, such as that of a watchman, or a messenger, or other light work.

That being so, there was in my opinion evidence upon which the learned county court judge could act and come to the conclusion of fact that he did. In my opinion the case is covered by the decision of the Court of Appeal in *Anglo-Australian Steam Navigation Co.* v. *Richards.* (1) In that case it was proved that the workman was fit for light work, that is, for some light

(1) 4 B. W. C. C. 247.

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work—not for any description of light work. The man was lame—he had one leg shorter than the other; but he admitted that he never tried to obtain any light work, and no evidence was given in that case that the man had been offered light work. No evidence was given that he could obtain light work. The Master of the Rolls put it in this way: "The evidence is that the man has so far recovered that he is now fit to do light work which does not require much getting about"; that is to say, not every description of light work, not all the light work that any able-bodied person could do, but such light work as does not require much getting about; that was his limited sphere of work. The Master of the Rolls adds: "The man says in reply 'I have never tried to get light work' and he seems to have taken up the position that he is entitled for the rest of his life to do no work." That is exactly applicable to this case. He has not attempted to obtain light work. He does not see why he should when he has a wife earning 15*s*., and he draws his compensation of 11*s*. He seems to me to consider that he is entitled for the rest of his life to do no work and to live upon the 11*s*. and his wife's earnings. I think this case is governed by that which I have mentioned. The learned county court judge was right, and, therefore, this appeal fails.

PHILLIMORE L.J. I agree. There is some difficulty in reconciling the principles upon which *Proctor & Sons* v. *Robinson* (1) was decided, and the principles upon which three like cases, *Anglo-Australian Steam Navigation Co.* v. *Richards* (2), *Cardiff Corporation* v. *Hall* (3), and the Scotch case of *Carlin* v. *Stephen & Sons* (4), were decided. But I do not think we can accept the test which counsel for the appellant suggested to us. I understood him to put it that if the Court thought the man could do any form of light work, then no special evidence was required; but if the Court thought he could do some particular forms of light work, then special evidence was required. I do not think there can be, in principle, any such distinction. No doubt when a man's capacity for work is limited

(1) [1911] 1 K. B. 1004.
(2) 4 B. W. C. C. 247.
(3) [1911] 1 K. B. 1009.
(4) 1911 S. C. 901; 5 B. W. C. C. 486.

you must be very careful to see that the class of work still open to him is obtainable by him in the district in which he lives, or in the district to which he would naturally go. It is not enough to say though a man has lost both legs and both arms he can conceivably do something with his stumps. Nor is it enough to say that a man who has lost a limb, an arm, or a leg can necessarily do light work. He may be in a situation where strenuous exertion is so necessary that there is no room for work by a man who has lost an arm or a leg; but it may very well be that a person without an arm may have as many spheres of work open to him as a lame person with two arms and two legs. It always becomes a question of degree, and it always becomes a question in which the general knowledge of the tribunal is properly applicable. It would not do, of course, to say that something can be conceived which this man can do. You must go further than that. But in this case the county court judge had a young man before him the strength of whose physique he saw, and whose remaining arm he tested; he knows the locality; he knows what distance it is from the place where this man lived to Stanley Road and to Birkenhead; he knows the sort of basket the Lancashire people carry these pigeons in, he knows the number of pigeons that go into the basket, and the weight of them; and he knows also that this man had made a purely illusory application—a formal application—once, quite shortly after his accident, to his own employers, who he does not suggest had the class of work to give him which he could do. It is what might be called a colourable application, and the man has made no serious application since. The judge also knows—it is his business to know—the habits and capacities of Liverpool, and he ought to know whether or not there are places, undoubtedly in a restricted area, and occupations such as a one-armed man could get. Applying that gauge he has found as he has, and I do not think we ought to interfere.

Appeal dismissed.

Solicitors: *G. S. Lynskey & Son, Liverpool; J. H. Glover, Liverpool.*

G. A. S.

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1915
Feb. 2.

[IN THE COURT OF APPEAL.]

BARRON *v.* SEATON BURN COAL COMPANY, LIMITED.

Employer and Workman—Compensation—Industrial Disease—Gradual Process—Nature of Employment—Last Employer—Third Party—Contribution—Period of Employment—Inquiry into Conditions of Employment—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 8.

A workman claimed compensation from his last employers on the ground that he was suffering from an industrial disease within s. 8 of the Workmen's Compensation Act, 1906. (1) He had been employed by five firms as a coal miner within the twelve months. The amount of compensation was agreed, and third party notices were served on the other four firms claiming contribution from them. Three of them agreed to an award against them in amounts proportionate to the length of the respective periods of employment; but the fourth contended that the length of time of employment was immaterial, and claimed that the judge should hold an inquiry and admit evidence with a view to ascertaining the facts and fixing the respective liabilities. The learned judge refused to do this and made an award on the basis of the length of time of the respective employments:—

Held, that there was no principle which justified the view that the duty of the arbitrator was merely to work out the arithmetical proportions of the length of time of the employments. He must deal with it as with any other question in the arbitration, admit evidence, and consider and distinguish between the respective merits of the employers.

APPEAL from an award of the county court judge of Newcastle-upon-Tyne sitting as arbitrator under the Workmen's Compensation Act, 1906.

(1) Workmen's Compensation Act, 1906, s. 8, sub-s. 1:

"Where—

"(i.) the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which a workman is employed certifies that the workman is suffering from a disease mentioned in the Third Schedule to this Act and is thereby disabled from earning full wages at the work at which he was employed; . . . .

and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependants shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications:—

" . . . . . .

"(*c*) The compensation shall be recoverable from the em-

R. W. Barron claimed compensation from the Seaton Burn Coal Company, Limited, on the ground that he was suffering from nystagmus, an industrial disease within s. 8 and Sched. III. of the Act. He had been employed as a coal hewer by several firms within the twelve months next previous to the date of disablement, October 28, 1913, and his last employers were the Seaton Burn Coal Company, Limited. The dates of the other employments were as follows:—

Workington Iron and Steel Company, Limited, October 7, 1912, to December 9, 1912.

Blackett and South Tyne Collieries, Limited, December 23, 1912, to February 16, 1913.

East Walbottle Coal Company, Limited, February 22, 1913, to April 17, 1913.

Bolckow, Vaughan & Co., Limited, July 2, 1913, to September 20, 1913.

Seaton Burn Coal Company, Limited, September 30, 1913, to October 10, 1913.

The amount of compensation was agreed at 14*s.* per week, and third party notices were served on the previous employers asking for contribution from them. The employers other than the East Walbottle Coal Company consented to an award against them in amounts proportionate to the length of the respective periods of employment; but the East Walbottle Coal Company contended that the time of employment was immaterial; that the Seaton Burn Coal Company had to prove that the earlier employment was one to the nature of which the disease was due; they alleged that the conditions of working at their own colliery

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ployer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due:

"Provided that—

"

"(iii.) If the disease is of such a nature as to be contracted by a gradual process, any other employers, who during the said twelve months employed the workman in the employment to the nature of which the disease was due, shall be liable to make to the employer from whom compensation is recoverable such contributions as, in default of agreement, may be determined in the arbitration under this Act for settling the amount of the compensation."

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were such that they could not contribute to the development of nystagmus; and they claimed that the judge should hold an inquiry and admit evidence with a view to ascertaining the facts and fixing the respective liabilities.

The learned county court judge held that it was not open to them to have the conditions of work at all the collieries in question inquired into with a view to diminishing their own contribution; declined to admit evidence for that purpose; made an award for the agreed amount; and ordered the East Walbottle Coal Company to contribute in proportion to the period of employment with them.

The East Walbottle Coal Company appealed.

W. Shakespeare, for the appellants. The conditions in mines vary very much, and many employers take great precautions to protect their workmen from accident and disease. The appellants have done so, and are prepared to prove that it is almost impossible for anybody to contract nystagmus in their mine. They are also prepared with evidence to prove that in the case of one of the respondent companies the conditions of their mine are likely to produce disease. Sect. 8 intended these differences to be taken into consideration in fixing the amount to be contributed by previous employers. The workman is not to be embarrassed by any doubt whom he is to sue. Sect. 8, sub-s. 1 (*c*), provides that he is to recover compensation from his last employer during the previous twelve months; and by s. 8, sub-s. 1 (*c*) (iii.), that employer may in the case of diseases contracted by a gradual process like nystagmus call upon previous employers during the twelve months to contribute towards payment of the compensation. These contributions are, in default of agreement, to be "determined in the arbitration under this Act." That means an ordinary hearing by the arbitrator and an award made by him after hearing evidence and considering all the facts. It is his duty to differentiate between the employers: *Mallinder* v. *J. Moores & Sons* (1); *Dean* v. *Rubian Art Pottery*. (2) The right to contribution exists only in respect of employments to the nature of which the last employer proves that the disease was

(1) [1912] 2 K. B. 124, 130. (2) [1914] 2 K. B. 213.

due. Evidence must be admitted to prove this. Clauses (i.), (ii.), and (iii.) all apply to gradual diseases and make a regular inquiry necessary; the amount of the contribution cannot be settled by the length of the employments. Evidence is required on questions under s. 8, sub-s. 2. There is no authority which justifies the judge in fixing the contributions on a time basis.

Schwabe, K.C., and *E. Meynell*, for the other employers. Conditions of employment are dealt with by the Factory Acts; they are not available for altering the burden cast upon previous employers by the Act of 1906. The question depends upon the construction of s. 8, sub-s. 1 (*c*) (iii.), not on clause (ii.). By s. 8, sub-s. 1 (i.), the certifying surgeon has to certify that the workman is suffering from a gradual disease and to fix the period of disablement. As soon as that date is fixed it is not open to a previous employer to prove that the disease was not contracted with him: *Mallinder* v. *J. Moores & Sons*. (1) Therefore the judge only has to ascertain the length of each employment and fix the proportionate contributions on that basis. Clause (iii.) says that previous employers "shall be liable." There is nothing in the section to enable the judge to decide which of the employers is liable.

W. Shakespeare in reply.

LORD COZENS-HARDY M.R. In this case we have listened to arguments as to the true construction and real effect of a part of s. 8 of the Workmen's Compensation Act: whether s. 8, sub-s. 1 (*c*), clause (iii.), is or is not to be read with clause (i.) and clause (ii.); whether clause (iii.) applies to a disease contracted by a gradual process; and whether clauses (i.) and (ii.) apply only to diseases not falling within clause (iii.), which raises a very difficult point. I think this case may be decided on a different and shorter ground. On the facts as found by the learned county court judge a workman suffered from nystagmus, and his last employer was the Seaton Burn Coal Company. There were five employers altogether within the year, but I need not name them all. It is admitted that the man was suffering from nystagmus, and the figure which he was entitled to receive was ascertained

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and agreed. The last employer does not dispute that. The workman is not complaining of anything, because he has got his money. The question really is what are the rights of the four colliery owners prior to the last employer. One of these companies, namely, the East Walbottle Coal Company, complain that they have not been properly treated. They proposed to give evidence to satisfy the county court judge that the working arrangements at their colliery were so good and so far superior to those of the other collieries in question that it is not right that the other employers should simply bear a rateable proportion of the total sum, having regard only to the number of days or weeks in which the man was employed at their collieries. The learned county court judge said this: "I was of opinion that nystagmus being, as was admitted, a 'disease of such a nature as to be contracted by a gradual process,' it was not open to any of the employers within twelve months previous to the certificate of the certifying surgeon to dispute their liability to contribute (s. 8, sub-s. 1 (*c*) (iii.)) or to have the conditions of work at all such collieries inquired into with a view of increasing or diminishing their respective contributions. Sect. 8, sub-s. 1 (*c*) (iii.), was in my opinion intended to obviate the necessity of making such inquiries in the case of a disease acquired gradually. I therefore declined to admit evidence for this purpose, and made an award for the applicant for the agreed amount and ordered that the East Walbottle Company should contribute in proportion to the period for which the man was employed with them." Now the matter came before the learned county court judge under s. 8, sub-s. 1 (*c*) (iii.), which I will read: "If the disease is of such a nature as to be contracted by a gradual process, any other employers, who during the said twelve months employed the workman in the employment to the nature of which the disease was due, shall be liable to make to the employer from whom compensation is recoverable"—that is the last one—"such contributions as, in default of agreement, may be determined in the arbitration under this Act for settling the amount of the compensation." There has been no agreement between the five colliery owners here. It falls therefore to be determined in the arbitration under the Act, and I know no principle which can justify the view that the

arbitrator under such a statutory direction has only to work out a mathematical calculation to find the proportion of time as compared with twelve months for which each of the five companies employed the workman. I think it must be a matter which he must deal with like any other arbitrator. He must listen to such evidence as is tendered to him. I think it is conceivable and right that he may say: "One of these five employers has a colliery so admirably arranged as almost to assure that nystagmus will not be met with amongst the colliers in their employ, whereas one of the other five collieries is so badly arranged that there is a greater probability of it occurring there." With such evidence before him he must do the best he can to apportion the liability as between these five companies, and if after listening to the evidence he finds that nothing else but a rateable proportion is possible, so be it; but he cannot, it seems to me, preclude or shut out all evidence as to that and say: "All my duty is to make a mathematical calculation." On that ground I think the award is bad and the appeal must be allowed.

SWINFEN EADY L.J. stated the facts and continued. The statute says that the respective employers "shall be liable to make to the employer from whom compensation is recoverable such contributions as, in default of agreement, may be determined in the arbitration under this Act for settling the amount of the compensation." The statute does not give the measure of the contribution. This section does not contain any provision that the contribution from former employers is to be in any way proportionate to the period during which they respectively employed the workman in that employment. It says nothing of the sort. In my opinion the county court judge was not entitled to say that he was limited to a calculation of the respective periods during which those former employers employed the man in that employment. He has, as arbitrator, to determine what, under all the facts of the case, is a fair and proper contribution for the former employers to make to the compensation which the last employer has to pay. In my opinion the county court judge is entitled to consider all the facts of the case and

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then to determine the contribution accordingly, and not to limit himself, as he has done, to merely calculating the number of days during which the man was in these respective employments. On these grounds I am of opinion that the appeal ought to succeed.

PHILLIMORE L.J. In this case I do not understand that it is seriously suggested on the part of the present appellants that their contribution would be nothing, and therefore it is unnecessary to determine whether the words in this sub-clause (iii.) about contributions mean such contributions if any, or necessitate there being some contribution by each of the previous employers. I understand we are determining nothing about that question. What we have to consider is how the contributions, supposing there are some, are to be measured. It seems to me that the learned county court judge has unduly narrowed his powers and has put a construction upon this clause which might work very serious injustice. I do not see why an employer should not be able to give evidence saying "The conditions of my working are such that it is extremely unlikely that a workman will develop disease to any extent or acquire the disease to any important extent with me; but I am not driven to such a thing, because I can prove to you by medical evidence or otherwise that in fact the man did acquire very little of his disease with me." It seems to me that, as the section says that contributions are to be determined by arbitration, it does not mean that they are to be determined by somebody making a purely mathematical calculation, and therefore I agree that the appeal must be allowed.

Appeal allowed.

Solicitors: *William Hurd & Son, for Isaacs & Heath, Sunderland; Rawle, Johnstone & Co., for Cooper & Goodger, Newcastle-upon-Tyne.*

H. C. R.

[IN THE COURT OF APPEAL.]

C. A.
1914
Oct. 26, 27.

HENDON PAPER WORKS COMPANY *v.* SUNDERLAND ASSESSMENT COMMITTEE.

Poor Rate—Gross Estimated Rental—Evidence—Admissibility.

On the hearing of an appeal to quarter sessions against a poor rate in which the assessment committee contended that they were entitled to give evidence that the gross estimated rental inserted in the rate-book was too low, they stated as facts which they could prove that in the years 1900 and 1906 by agreement between the appellant company and the assessment committee the net rateable value was fixed at a certain figure, to which 50 per cent. was added, the sum so arrived at to be deemed the gross estimated rental and inserted as such in the rate-book. The recorder at quarter sessions held, first, following *Horton* v. *Walsall Assessment Committee* [1898] 2 Q. B. 237, that the assessment committee were not entitled to call evidence to show that the gross estimated rental was too low; and, secondly, that the above allegations of fact, if proved, would not amount to an estoppel upon the company from relying upon that decision. A Divisional Court held that his decision was right upon both points:—

Held, first, that, as a general principle of law, the assessment committee were bound by the amount of the gross estimated rental appearing in the rate-book, and were not entitled to call evidence before quarter sessions to show that the gross estimated rental had been fixed too low.

Horton v. *Walsall Assessment Committee* [1898] 2 Q. B. 237 approved and followed.

But *held*, secondly, that the alleged facts, if proved, would be evidence of an estoppel against the appellant company, and that the case must go back to quarter sessions to hear evidence of the alleged facts.

Appeal of the assessment committee from the judgment of a Divisional Court (Channell, Rowlatt, and Atkin JJ.) on a case stated by the Sunderland Quarter Sessions. The facts were as follows.

By a poor rate for the parish of Sunderland made on October 28, 1911, the Hendon Paper Works Company, Limited, were rated in respect of premises owned and occupied by them on an assessment of 5587*l.* gross estimated rental and 3725*l.* net rateable value. They paid the rate on December 14, 1911, but on February 9, 1912, they gave notice of objection to the valuation list. The assessment committee refused them any relief, and on

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September 16, 1912, the company gave notice of appeal to the quarter sessions.

On the hearing of the appeal in April, 1913, before the quarter sessions no witnesses were called, but counsel for the company read and put in certain correspondence which had passed between the parties wherein the assessment committee admitted for the purposes of the appeal that the statutory deductions which should be allowed in the ordinary way from the gross assessment of the company's works, &c., amounted to at least such a sum as would leave the net assessment nil. Counsel for the company then contended, on the authority of *Horton* v. *Walsall Assessment Committee* (1), that the company were entitled to have their assessment reduced to nil.

Counsel for the assessment committee in answer to this contention stated that they were prepared to call evidence to prove the following allegations of fact.

(*a*) That in the year 1900 the assessment of the company's works was revised and that by agreement between a representative of the company on the one hand and a representative of the assessment committee on the other the rateable value was ascertained in the first instance by taking a percentage on an agreed capital value of the whole concern, and that having so ascertained the rateable value to be 3500*l.* the parties agreed, without having any regard to the actual sums spent or likely to be spent upon repairs, insurance, or other expenses, to add to the rateable value 50 per cent. thereof, and that the sum so arrived at, namely, 5250*l.*, should be deemed to be the gross estimated rental.

(*b*) That in the case of undertakings such as that of the company the method above described is the ordinary and well-recognized method of arriving at the figures, both gross and net, which are required to be inserted in the valuation lists upon which the rates are based; that in such cases it is impossible to find any one willing to take or any landlord willing to let the premises on a yearly tenancy, either on a non-repairing agreement or on any terms, and that it would be an absurd and impossible task to attempt in the first instance to ascertain what a yearly tenant would give for such premises and then arrive at

(1) [1898] 2 Q. B. 237.

the figure upon which the rates are to be based by deducting the average amount spent by the landlord for repairs, insurance, &c.

(*c*) That a precisely similar course to that mentioned in paragraph (*a*) hereof was followed in the year 1906, when the rateable value of the company's premises was increased by agreement from 3500*l.* to 3725*l.* on account of certain additions made to their works and fixed plant. By agreement the rateable value was first ascertained, namely, 3725*l.*, and an addition of 50 per cent. was then made thereto in order to arrive at a figure which should be deemed to be the gross estimated rental, namely, 5587*l.*

(*d*) That the figures last mentioned and the method of computation thereof remained until the year 1909, when the company appealed against the rates made upon their said premises in April and October of that year. The notice of appeal in 1909 was (except as regards the dates of the rates appealed against) in identical terms with the notice of September 16, 1912. The appeal against the rates of 1909 was tried before the quarter sessions on June 21 and 22, 1910. For the purposes of that appeal the company by their counsel stated that they would not rely on the decision in *Horton* v. *Walsall Assessment Committee* (1), and would not contend that insufficient deductions had been allowed from the gross estimated rental of 5587*l.*, and that the only question for the Court to determine was whether, having regard to the capital value of the concern, 3725*l.* was or was not an excessive rateable value. The appeal, having been heard on its real merits, was dismissed with costs.

(*e*) That in 1900, 1906, and 1909 the amount spent on repairs, insurance, and other expenses authorized by law to be deducted from the gross estimated rental, to the knowledge of the representatives of both parties, very largely exceeded 50 per cent. of the rateable value agreed upon in 1900 and 1906 respectively.

(*f*) That up to the hearing of this appeal in April, 1913, the company had done nothing to intimate that they were dissatisfied with the method in which the gross estimated rental and rateable value of their premises had in fact been arrived at in 1900 and 1906.

None of the above-mentioned allegations of fact were admitted

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by the company, who said they had witnesses to disprove them.

The quarter sessions ruled that the assessment committee were not entitled to call evidence to show that the gross estimated rental was too low, and that the allegations of fact above stated in paragraphs (*a*) to (*f*), even if proved to the satisfaction of the Court, would not estop the company for the purposes of this appeal from contending that insufficient deductions had been allowed from the gross estimated rental or from relying upon *Horton* v. *Walsall Assessment Committee.* (1)

The quarter sessions therefore allowed the company's appeal, and, while not interfering with the gross assessment of 5587*l.*, ordered the rateable value of 3725*l.* to be reduced to nil, and further ordered the assessment committee to repay to the company the amount paid by the latter in respect of the rate.

The question for the opinion of the Court was whether :

(*a*) The decision of the quarter sessions that the assessment committee were not entitled to call evidence to show that the gross estimated rental was too low was correct.

(*b*) The decision of the quarter sessions that the said allegations of fact if proved would not amount to an estoppel was correct.

The Divisional Court held that the decision of the quarter sessions was correct on both points.

The assessment committee appealed.

Ryde, K.C., and *Simey*, for the appellants.

Tindal Atkinson, K.C., and *S. L. Porter* were called upon to argue the point as to estoppel only.

BUCKLEY L.J. This matter comes before us upon a case stated by quarter sessions on a rating appeal ; the questions for the decision of the Court are two. For the purpose of the first question I need only state that in the valuation list, in force at the date when the rate in question was made, the figure at which the premises to be rated was assessed was 5587*l.* gross. The question for the decision of the Court is whether the assessment

(1) [1898] 2 Q. B. 237.

committee were entitled to call evidence to show that this gross estimated rental was too low. That turns, I think, upon the following considerations. By the Parochial Assessment Act, 1836 (6 & 7 Will. 4, c. 96), it was provided by s. 2 that every rate shall "contain an account of every particular set forth at the head of the respective columns in the form given in the schedule to this Act annexed, so far as the same can be ascertained." One of those heads was the gross estimated rental. The section goes on: "and the churchwardens and overseers, or other officers whose duty it may be to make and levy the said rate, or such a number of the said churchwardens and overseers or other officers as are competent to the making and levying of the same, shall, before the rate is allowed by the justices, sign the declaration given at the foot of the said form." The declaration is: "We do declare the several particulars specified in the respective columns of the above rate to be true and correct, so far as we have been able to ascertain them, to which end we have used our best endeavours." The Act of 1836 did not in so many words cast the duty of preparing the list of assessments upon the overseers, but there is no doubt that they were intended to do so. The Union Assessment Committee Act, 1862, did throw it directly upon the overseers, because it is provided by s. 14 that "the overseers of each parish in the union shall, within three calendar months after the appointment of such committee, make a list of all the rateable hereditaments in such parish, with the annual value thereof respectively in so much of the form shown in the schedule to the Act sixth and seventh William the Fourth chapter ninety six as is set out in the schedule to this Act," and "the schedule to this Act" preserves the head of gross estimated rental. Then by s. 15 "the gross estimated rental for the purpose of the schedule to this Act shall be the rent at which the hereditament might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rent-charge, if any." The matter stands thus, that under the statute it is the duty of the overseers to ascertain according to the best of their ability what is the gross estimated rental of the premises to be rated, and to make a declaration in the terms of the statute that they have done that to the best of their endeavour.

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That being so, this figure of 5587*l.* was a figure introduced into the valuation list by the assessment committee under the machinery which I have mentioned. It is a figure which they put forward as being the gross estimated rental. Is it competent to them to produce evidence to show that it is not the right figure? In my opinion it is not. The figure originates from them, and the ratepayer is entitled to say "I am content with the figure which you have fixed as the gross sum." He may dispute the figure which has been fixed by them as the net sum, but they cannot go back upon the figure which has been fixed by them as the gross sum. That was the decision in *Horton* v. *Walsall Assessment Committee* (1), and I may conclude what I have to say on this part of the case by saying that in my judgment that case was rightly decided.

I now come to the second question. For the purpose of deciding this I have to make a hypothesis. I have to suppose that certain allegations of fact set out and marked (*a*) to (*f*) in the case stated may be proved. Assuming they are proved, the question is whether the facts thus alleged amount to an estoppel binding the parties as regards this figure of 5587*l.* gross estimated rental. This figure of 5587*l.* has been fixed in a way I am going to mention. The rateable value is fixed at 3725*l.* If those two figures both stand, the statutory deductions would amount to the difference between the two, which is 1862*l.* It is admitted that the statutory deductions amount in point of fact to a very much larger sum of money, something like 10,000*l.*, with the result that, if the 5587*l.* is taken as a fixed figure and the statutory deductions are allowed at the sum which the company say they are in a position to prove, the net value will be nothing at all and the premises would bear no rate. The question is whether it is competent to the parties to set up that state of things. The allegations of fact amount to this. In the year 1900 the assessment of the premises was arrived at by agreement between the parties. They started by ascertaining by agreement the net value to be 3500*l.* Instead of beginning with the gross, ascertaining the statutory deductions, and then reaching the net, they began at the other end, agreed the net, and then their next step

(1) [1898] 2 Q. B. 237.

was this, that without any regard to the actual sum spent or likely to be spent upon repairs, insurance, or other expenses, they added to that net value 50 per cent., and called the resulting sum the gross. That was to be deemed to be the gross estimated rental. That was an agreement which we are to assume was made in the year 1900. Upon those facts of course the 5250*l.*, which was the figure so arrived at, was not an estimated gross figure at all; it was an arbitrary, fictitious figure arrived at by adding to an agreed net valuation an arbitrary sum of 50 per cent. without any regard to what was in fact the amount of the statutory deductions. Matters so continued, according to the allegations which I am to assume may be proved, till 1906. In 1906 it was agreed that the net value had gone up from 3500*l.* to 3725*l.*, whereupon by agreement again they added 50 per cent. to the 3725*l.* and so arrived at the figure I first mentioned—5587*l.* The valuation list thus settled in 1906 continued down to the date at which this rate was laid. What was the result as regards the position of that figure of 5587*l.* in the valuation list when in 1911 a rate was laid upon the valuation then standing? Sect. 24 of the Act of 1862 provides that "every valuation list . . . . shall, with and subject to the alterations and additions for the time being made therein or thereto by any supplemental valuation lists so approved and delivered, be the valuation list in force in such parish . . . . until a new valuation list in substitution for the same be approved and delivered in like manner." As from 1906, by virtue of the Act of Parliament, this valuation list, not having been altered by supplemental valuation list approved and delivered, continued to be the valuation list in force. It was a valuation list containing an arbitrary figure; for the purposes of my judgment, I will call it a fictitious figure. It was a figure arrived at in the way I have described, by beginning with the net value, adding a sum which paid no real regard to the amount of the statutory deductions, and thus arriving at a figure which was a conventional and fictitious figure; and it seems to me that under those circumstances when it was found in October, 1911, in the list, it stood in the list as that which it was from the first, not a real figure, but a fictitious figure introduced by the parties as being a figure which did

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not affect any question of rateability, because it was an arbitrary figure evolved from an agreed rateable figure. Now I am also to assume that it is proved "that in 1900, 1906, and 1909 the amount spent on repairs, insurance, and other expenses authorized by law to be deducted from the gross estimated rental, to the knowledge of the representatives of both parties, very largely exceeded 50 per cent. of the rateable values agreed upon in 1900 and 1906 respectively." It seems to me if these facts are proved it would be made out that the party rated is seeking to rely upon a conventional figure of 5587*l.* arrived at as I have stated, as if it were a real figure against which he is entitled to set the real statutory deductions when he knows that it is not a real figure, but a fictitious figure arrived at by treating the statutory deductions as being not that which he is now going to say they are, but an arbitrary and very much less sum. To express the point of estoppel, I should put it in this way: the ratepayer in 1911 induced the assessment committee to leave the figure of 5587*l.* to stand in the valuation list as the gross estimated rental of the premises by leading them to believe that he would not treat the 5587*l.* as other than an agreed fictitious figure. It appears to me that if these facts are proved—what will be proved of course remains to be seen hereafter—the ratepayer would be seeking to rely upon an agreed fictitious figure as being a real sum, and to set up the real statutory deductions when he knew that that figure was agreed upon the basis of supposed and illusory statutory deductions; and that would be a matter in which he would be really leading the assessment committee into a trap. There is one point in the case to the contrary of what I have been saying which has impressed me a good deal, and that is in paragraph (*d*). It is alleged that there was an appeal from the rates in 1909, and upon that occasion the case states: "For the purposes of that appeal the company by their counsel stated that they would not rely upon the decision in *Horton* v. *Walsall Assessment Committee* (1), and would not contend that insufficient deductions had been allowed from the gross estimated rental of 5587*l.*" So that from that it would appear that the assessment committee were

(1) [1898] 2 Q. B. 237.

then warned of this lurking danger, that this contention might be set up, and were told that upon that occasion the company were not seeking to raise it, implying that on a subsequent occasion they might seek, as they are now seeking, to raise it. But there was nothing amounting to notice that the company were going back from the agreed convention between the parties. For these reasons it seems to me we ought to answer the second question by saying that the decision of the recorder was wrong and the case ought to go back before him for the facts to be proved, and that he shall adjudicate upon the matter upon the facts proved before him.

PHILLIMORE L.J. In my opinion the decision in *Horton* v. *Walsall Assessment Committee* (1) is correct, and the expression of opinion (for it is nothing more than that) of Day J. in *Denaby and Cadeby Colliery Co.* v. *Doncaster Assessment Committee* (2) is correct too. I think that when an assessment committee have told a ratepayer that the gross estimated rental of his hereditament is a particular figure, the ratepayer is entitled to hold them to that, and to have the statutory deductions made from that figure, and that the assessment committee are not entitled on such an appeal as this either to correct the gross estimated rental in fact or to correct it notionally. But it seems to me that it may be important for this case to see upon what principle that rests. I do not think it rests upon the principle that the statute requires that the gross shall be treated for all purposes as correct and that the statutory deductions should necessarily be made from that gross. I think it rests upon the principle qui ponit fatetur —that the assessment committee has made that allegation and must stick to it and cannot resile from it. If I may quote my own words, I think the ratepayers are entitled to the benefit of the finding of the assessment committee as to what the gross value is; or, as Wills J. said in *Horton* v. *Walsall Assessment Committee* (1) (no doubt this is only one of the reasons for his judgment), it would be a hardship if a ratepayer "who was satisfied with the gross estimated rental, but was dissatisfied with the amount of the deductions, might come into Court with a very

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good case upon the ground of the amount of the deductions, and if he were then to be met with a wholly fresh case, of which he had no notice, as to the gross estimated rental not being sufficient, it would involve, either an adjournment of the case upon terms, or his having to embark upon a long inquiry of an expensive nature, for which he might not be prepared . . . ."

That leads me to consider the next question in the case, which is whether, assuming the assessment committee to prove the allegations set out in the paragraphs marked (*a*) to (*f*) in the case stated, they would be entitled on this particular occasion to say that *Horton* v. *Walsall Assessment Committee* (1) did not apply, and that it was not right in this case to take the gross estimated rental as a fixed figure and arrive at the net rateable value by making the proper statutory deductions from that figure. What may be in fact proved we cannot say, and I think it would have been more convenient if the recorder, instead of deciding the case on the assumption that the allegations could be proved, had taken the evidence upon the subject. I take it that the allegations amount to this: It is a very difficult thing in an undertaking such as the present to arrive at the gross value. No doubt the statute contemplates that this should be done in ordinary cases—arrive at the gross value, make the statutory deductions, and so get the net rateable value. But that is a very difficult thing in such an undertaking as this. A practice has grown up of taking a percentage on the agreed capital value, and so getting at the net rateable value. Outside the metropolis the gross estimated rental is unimportant, but the statute requires it to be inserted in the valuation list, no doubt that the overseers may be taught to do their duty and to make the proper deductions, no more and no less. Having arrived, therefore, at the net rateable value by a short cut without going through the gross value and making the proper deductions, but it being nevertheless necessary to have in the valuation list a statement of the gross value, though it would be a very expensive matter to ascertain it, the assessment committee and the ratepayer have come to this agreement: they say, "We both agree that a conventional figure shall be inserted, and we both agree

(1) [1898] 2 Q. B. 237.

that we will draw no argument from that conventional figure or avail ourselves of it in any way. We, the assessment committee, will not, while the list remains as it is, put up your rateable value by saying that, the gross being fixed at so many thousands a year, the statutory deductions are only so many hundreds, and therefore the net is the residue. Neither on the other hand will we, the ratepayers, seek to cut down our rate by saying that, the gross value being fixed at only so much, we can now prove such and such deductions which will reduce our net rateable value." These are allegations of an agreement which at any moment can be terminated, but it can only be terminated provided both parties are put in an equal position on the termination. The valuation list remains until it is altered, and if the rating authority make a rate while the valuation list contains the conventional gross figure and it is then open to the ratepayer suddenly and without warning, and when the assessment committee cannot resile from what they have done, to treat the gross figure as a real figure, then injustice would be done. Therefore until such notice has been given as will enable both parties to be back in an equal position, neither side is entitled to treat the conventional gross figure as a real one.

With regard to the assessment committee: when once they have published a valuation list and a rate has been made, *Horton* v. *Walsall Assessment Committee* (1) decided that they are bound by the gross estimated rental and cannot alter it. Therefore, if this agreement was made and the ratepayer is going to use the gross estimated rental as a real figure, he must give the assessment committee notice before the rate is made. The ratepayer, on the other hand, is bound neither by the gross estimated rental nor by the net rateable value, and he can object to both by appeal on every rate. Therefore, there is no necessity that he should have notice from the assessment committee that they are going to treat the conventional figure as a real figure. The assessment committee, however, do require that the ratepayer should give them notice before they have committed themselves by making and publishing a rate. The facts proved may not support these allegations, but all we have to determine is that, supposing these

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facts as they are stated, and nothing more, are proved, then the assessment committee would be right in this matter. Therefore I think that this case must go back to the learned recorder for his consideration.

PICKFORD L.J. This case raises two points. One is whether the decision in *Horton* v. *Walsall Assessment Committee* (1) is correct, and the other is whether the respondent company were estopped, when they were before the quarter sessions, from relying on that decision, which was that, where the rating authority have inserted in the rate-book the gross value of a hereditament, they are bound by it, and cannot, where the appellant against the rate shows that if proper deductions were allowed from that figure his rateable value would have to be reduced, proceed to give evidence that the gross value as inserted is too low. Of course, that produces very often entirely incorrect results. In this case it produces an absolutely ridiculous result, because it shows that the rateable value of a property which only a few years ago was agreed by its owners to be nearly 4000*l.* is absolutely nil. It is not contended that that is anything but a grossly incorrect result in fact, but it may be that the respondents are entitled to the benefit of that result in law. It seems to me that, apart from the alleged agreement, the respondents here knew that the gross value inserted in the list was not a correct one. They knew that, in accordance with the ordinary practice followed by many rating authorities, the method here adopted had been not to ascertain the gross value and then from that deduce the net value, but to get the net value direct and then, having got that, as the gross value was wholly immaterial to both parties, this hereditament not being in the metropolis, to insert a purely arbitrary figure for the gross value. They knew that that was the case—that the gross figure was not arrived at by any process of trying to be correct, but was a mere arbitrary figure because it did not matter what it was. I think it is clear also that they must have known that that figure, if it were used in the way in which they are now trying to use it, would lead to incorrect, and as I have said ridiculous, results. If they knew

(1) [1898] 2 Q. B. 237.

anything about their own business they knew that the statutory deductions to which they were entitled were very much greater than the difference between the two figures. Whether it is fair for them to use the gross figure in that way or not is a matter which it is not for me to discuss. They are entitled to do so, unless there is something to prevent them. It seems to me quite clear that the mere fact that they knew the rating authority was putting an insufficient figure was not enough. The question is whether in this particular case they have not done something which does prevent them from relying upon that figure in the way in which they claim to do. Personally I must say I have had great difficulty in seeing that this agreement went any further than the Divisional Court thought it did, an agreement for one year; but I think it is better that this Court or some other Court should have some opportunity of knowing what the real facts are, and whether in fact there was such an agreement as is suggested or stated, if you take every word of what is in the case as being proved. I do not attempt to say whether that will or will not be proved, but assuming it to be entirely proved, I think there is a possibility of its meaning something more than an agreement for a year, although I find it a little difficult myself to draw that conclusion.

I agree, therefore, that the first question should be answered in the affirmative, and that, so far as the second question is concerned, the facts should be investigated before the learned recorder.

Appeal allowed.

Solicitors for assessment committee: *Johnson, Weatherall & Sturt, for J. G. Marshall, Sunderland.*

Solicitors for company: *Rawle, Johnstone & Co., for Cooper & Goodger, Newcastle-upon-Tyne.*

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[IN THE COURT OF APPEAL.]

PORTER *v.* TOTTENHAM URBAN DISTRICT COUNCIL.

Contract—Building Contract—Obligation of Building Owner to give Possession—Possession given—Subsequent Interference by Wrong-doer—Delay and Damage to Builder—Liability of Building Owner.

By a contract in writing it was agreed that the plaintiff should build a school for the defendants, upon a site belonging to them, within ten months after the date of the contract, and that he should commence work and be at liberty to enter upon the site forthwith. The only access to the site was from a road adjoining other land of the defendants and over that land, and it was provided that the plaintiff should make a temporary sleeper roadway over that land from the street to the site. Possession of the site was given forthwith, and the defendants made a gateway through the fence separating their land from the street, and the plaintiff made and used the sleeper roadway through the gateway to the street. The owner of the soil of the street, alleging that it was not a public highway, prohibited its use by the plaintiff and threatened to sue him for an injunction. The plaintiff in consequence ceased work for more than two months until after the defendants had sued the owner of the soil of the street and obtained a decision that it was a public highway.

The plaintiff claimed damages for loss caused by the delay of the work, alleging a breach of the defendants' implied contract to give free and uninterrupted possession of and access to the site:—

Held, that there was no warranty to be implied from the contract to the effect that the plaintiff should be at liberty to work upon the land without interruption, and that the defendants were not liable to indemnify the plaintiff against the loss caused by the wrongful interference of a third party with the means of access to the site.

Appeal of the defendants from the judgment of a Divisional Court (Ridley and Bankes JJ.), reported [1914] 1 K. B. 663.

The plaintiff sued the defendants for damages for the loss sustained by him owing to the interruption of building work which he was carrying out for them under a contract made on February 20, 1912. By the contract the plaintiff agreed to build a school for the defendants upon a site belonging to them for the sum of 11,043*l.* according to the specification, plans, and bills of quantities thereto annexed; and it was provided that the plaintiff should be at liberty to enter upon the site immediately after the signing of the contract for the purpose of executing the works,

and should commence the works forthwith and complete the same within ten months from the date of the contract, subject to a penalty of 50*l.* for every week's delay in their completion.

The specification contained the following clauses:—

"The contractor is to form and maintain a sleeper roadway from Keston Road, along the new passage shown on the block plan and across the school recreation field, or any other sleeper roadways on the site, for carting materials to the new school buildings, and is to maintain and shift and relay same as necessary and take up and cart away same on completion of the works."

"Reinstate and make good the kerbs footway and road next new entrance in Keston Road during the progress of the works as necessary and at the close of works, providing any new materials required, to the satisfaction of the local authorities or owners."

The only access to the site was from a road, called Keston Road, adjoining other adjacent land of the defendants and across that land, which was separated from Keston Road by a hedge.

Possession of the site was given to the plaintiff on February 20, and the defendants made a gateway in the hedge in order to enable the plaintiff to have access to the site. The plaintiff commenced work on February 20, and constructed a temporary roadway of sleepers from the site across the defendants' land and through the gateway. Keston Road was not made up on the side next to the defendants' land, and the sleeper roadway was continued to the centre of Keston Road. The plaintiff used the sleeper roadway and carted materials over it until March 6, when one Rowley forbade him using Keston Road and threatened to bring an action against him if he did not give an undertaking to cease using the road. The plaintiff, after communicating with the defendants, gave the required undertaking and ceased work under the contract. Rowley was the owner of the soil of Keston Road, which was in fact a public highway; but he asserted tha a strip of land along the defendants' hedge had not been dedicated by him to the public, and he erected a wire fence along this strip and across the gateway made by the defendants.

The defendants brought an action against Rowley for an

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injunction restraining him from obstructing the access to their land from the highway, and on May 11 judgment was given in that action in their favour (1), which decision was subsequently affirmed in the Court of Appeal and in the House of Lords. The plaintiff recommenced work on the site, and subsequently brought this action.

The plaintiff, in his statement of claim, alleged that by reason of the delay of the works he was put to great expense and suffered loss, and he claimed damages for breach of the defendants' implied contract to give him free and uninterrupted access to the premises and also because he had discontinued the work at the request and by the authority of the defendants.

The action was referred to an official referee, who held that the defendants had not fulfilled their obligation to give possession of the site and gave judgment for the plaintiff for 560*l.* damages.

The defendants appealed to a Divisional Court (2), who held that there was no obligation, express or implied, upon the defendants to indemnify the plaintiff against the loss caused by the wrongful interference of a third party with the means of access to the site.

The plaintiff appealed.

Clavell Salter, K.C., and *B. A. Cohen*, K.C., for the appellant. There has been a breach of an implied warranty or undertaking by the defendants. Taking the contract as a whole, the defendants were bound to give the plaintiff free and uninterrupted possession of and access to the site; there was an implied warranty that the plaintiff should be at liberty to do the work without interruption by any one who challenged the title of the council. In the alternative, there is to be collected from the contract an implied promise by the defendants to put the plaintiff in full, free, and immediate possession of the land on which he was to work, which was broken by their not putting him in possession of the land in Keston Road on which work was to be executed. Further, there was a request by the defendants to the plaintiff to stop the work, which was in itself a breach of the implied warranty that he could do the work. Further, there was

(1) [1912] 2 Ch. 633. (2) [1914] 1 K. B. 663.

a commercial necessity to lay sleepers, which the plaintiff was unable to do; there was therefore a complete alteration of circumstances, and the contract became commercially impossible within the principle laid down in *Bush* v. *Whitehaven Trustees* (1) and *Jackson* v. *Union Marine Insurance Corporation.* (2)

Macmorran, K.C., and *Cartwright Sharp*, for the respondents. Rowley was a trespasser, and no warranty can be implied on the part of the council against the acts of a trespasser. As regards laying down sleepers in Keston Road, there is nothing in the contract which authorizes the plaintiff to lay them down. The defendants never warranted that the plaintiff should be able to put down sleepers on the soft ground in the road and never intended him to do so.

Clavell Salter, K.C., in reply. The contract necessarily amounts to a representation that the whole site is the building owner's.

BUCKLEY L.J. In my opinion the judgment of the Divisional Court is right, and this appeal fails. The action is one in which Porter, a builder, claims damages from a building owner measured by the fact that for a period of time from March 6 to May 17, 1912, he was, under the circumstances which I am about to state, prevented from going on with the work. The contract was one to build certain schools. It is said, and rightly, that it is what is called a "summer contract"; that is to say, it would be better done during the fine weather of the year. By this delay it was postponed. I have no doubt it was on that account more expensive to the builder, having regard to the facts with which I am about to deal. The figure to the extent of which the plaintiff was injured is measured between the parties at 560*l.* The question is whether the council are liable to him in that sum. In my opinion they are not.

The facts are as follows. There is a road called Keston Road, one portion of which runs roughly from south to north. I will call that the first portion. It then turns to the right, and runs roughly, not quite accurately, from west to east. That I will call the second portion. The defendants to the action were

(1) (1888) 52 J. P. 392. (2) (1874) L. R. 10 C. P. 125.

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the owners of land lying on the west side of the first portion and on the north side of the second portion. They were minded to erect certain schools upon the land which lay upon the west side of the first portion. In order to do that, they had to give access to the land for the purpose of bringing materials upon the land. By the contract to which I am about to refer, they suggested as the access, and they said it was the only access, an approach at a point lying just at the angle where the first portion of Keston Road turns into the second portion. The second portion of Keston Road was not wholly made up. The ground on the east side of the first portion and the south side of the second portion belonged to a man named Rowley. Rowley had laid out the road forming the first portion, and had made it up. He had laid a footpath on the west side, and had edged his footpath with a kerbstone. That kerbstone ran up to the angle, to the place where this intended access to the defendants' land was put. The second portion was not made up, except to the extent which I am about to state. Rowley's houses upon the south side of that second portion had been built. He had made up the road forming the second portion to this extent, that he had metalled, and so on, that half of it which was adjacent to his houses, but he had not metalled that part which was remote from his houses. That was the part which bounded upon the plaintiff's land, being the northern half of the second portion. In order to pass, therefore, from the Keston Road to the land on which the schools were to be built, it was necessary to cross the northern and unmade-up portion of the road. For the purposes of geography that is I think a sufficient statement.

That being the geography of the matter, the contract was as follows. It is a contract of February 20, 1912, between Porter, the present plaintiff, of the one part, and the Tottenham Urban District Council, the present defendants, of the other part. It provides, by article 1, that the contractor for a certain consideration shall build and finish the buildings described in the specification, plans and drawings, and so on "hereto annexed or thereby or by this contract implied or to be reasonably inferred therefrom, upon land belonging to the council at West Green, Tottenham, in the county of Middlesex." Article 4 provides that the contractor

shall be at liberty to enter upon the said premises immediately after the signing of this agreement for the purpose of executing the works; and article 5 imposes a penalty for delay in completing the works within the stipulated time. That is all that is material in the contract itself. But to that contract were annexed as part of it certain specifications, and so on, of the work to be done. Some part of that is material. It is headed "Preliminaries and Sundries. The contractor's attention is directed to the means of access to the site and the temporary roadway thereto described elsewhere. The only access will be from the Keston Road and along the temporary roadway therefrom for a length of about 320 feet." Then, later, the work to the Keston Road entrance and the new pathway to the site and the fences and other works in connection therewith are not to be executed until the sleeper roadway is removed. Then further down there is a provision for "forming and maintaining a proper sleeper roadway from the Keston Road to the site for a length of about 320 feet, or any other sleeper roadways or access to the works, and for shifting and relaying the same, and for taking up the same and removing and making good thereafter"; there is assigned to that a sum of 30*l*. At the end of the specification I find this: "The following works are to be executed in the public roadway, and are all to be done to the satisfaction of the authorities or owners, or pay them their charges for doing the same." Under that head comes: "10 feet run removing present 12 inch by 8 inch granite kerb and carting and depositing where directed." That means that that portion of the kerbed footway at the west side of the first portion of Keston Road was, at the end nearest to the proposed access, to be taken up. Then we shall find presently that it is to be replaced by a kerb laid a little more to the westward so as to allow of approach to the intended access to the site. So that there was something to be done on the public highway. The granite setts at the edge of the pavement to that extent were to be taken up. Then further on: "11 yards super crossings of granite setts 9 inches by 6 inches by 4 inches laid to curved falls and setting and jointing in Portland cement." That, when you come to look at the plans, meant this, that the contractor was in the public highway to lay granite setts, so as

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to form an approach from Keston Road to the intended gateway in the boundary of the defendants' land. It will be remembered, from what I read at the beginning, that the work to the Keston Road entrance, and the new pathway to the site, and the fences and other works in connection, were not to be executed until the sleeper roadway was removed. To that I will only add this statement: that it is provided that the contractor shall, upon the defendants' land, lay from the entrance to the site a sleeper roadway, and the time here mentioned is the time when that sleeper roadway is removed, that is to say, when the building is finished and the necessity for the sleeper roadway is over, and, therefore, that is necessarily a future time, presumably ten months later, as the work was to be done in ten months. Therefore I have this. There is certain work to be done on the defendants' land; there is also work to be done as provided by the contract, not on the defendants' land but in Keston Road, but that work is not to be done until ten months or more have elapsed. That is not to be done until the sleeper roadway upon the land is removed; that is to say, until the work is otherwise finished.

That being the contract between the parties, what happened was this. The contract being on February 20, 1912, the builder went into possession of the site and proceeded to carry out the work. Nothing particular happened until on March 5 there turned up a gentleman named Rowley. Rowley, it is to be remembered, was the man who had made up the Keston Road so far as it had been made up, and the owner of the buildings on the other side. Rowley on March 5 by his solicitors wrote to the clerk of the defendant urban district council a letter which contains this: "We are therefore instructed to ask you to give us an undertaking on behalf of the council by Thursday next not to use Keston Road for the purpose stated" just before in the letter, "it being our client's private property, and to remove the sleepers, if such sleepers were laid down by the council." So that really Mr. Rowley was setting up this contention: "Keston Road is my private property." He was also saying this as to the sleepers which, as a matter of fact, the builder had laid down approaching the entrance to the defendants' land over the soft

soil where the road had not been made up: "You have no right to put those there, and you must remove them." To finish the story about Mr. Rowley, what happened subsequently was this. He asserted these rights; he set up two rights in fact. He said that he had not dedicated to the public the northerly half of the second portion of Keston Road, that he had dedicated only the southern half of that portion, being the portion which he had made up. He also said this: "Whether that is so or not, in my dedication of the road I reserved to myself a strip of an inch or three inches wide," it does not matter which, "and you cannot cross that"; and therefore it was impossible that the council or the council's builders should pass from Keston Road on to the defendants' land. He litigated that; he took it before Joyce J., the Court of Appeal, and the House of Lords, and finally it was decided that he was wrong, that he was neither entitled to that strip of one inch or three inches, nor was he right in saying that he had not dedicated the whole. However, Mr. Rowley turned up with this claim. He made a claim, and in that state of things Mr. Porter, the plaintiff, on March 6, having got into communication with the defendants, gave an undertaking to cease to use the Keston Road entrance within three days. On March 7 the sleepers were taken up. I need not dwell for the moment on that part of the case. Nobody says that the builder had a right to interfere with the surface of Keston Road by laying sleepers. As a matter of law, whatever it may be as a matter of good sense, he was wrong in putting them there; and he was directed to take them up, and he took them up. Matters went on, and on April 3 and 10 letters were written, the effect of which was that the council told Porter to go on with his work. They said: "This is an interference of a private person"—in their view he was wrong, as he subsequently turned out to be—"and we intend to use the entrance." The council wrote Mr. Porter formally on April 3 saying they meant to use it. Thereupon the builder asked for an indemnity, which the council were not prepared to give him. On April 10 there is another letter in which they told him to go on with the work. Subsequently, on April 22, the council issued a writ against Rowley for an injunction to restrain him from interfering with

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the place. On May 1 Joyce J. decided that matter in favour of the council; and thereupon on May 17—I think that is the exact date—the builder went on, and nothing further occurred. This decision of Joyce J., as I have said, was upheld on appeal and in the House of Lords. The time in question is from March 6, when Porter gave his undertaking, till May 17, when he went on and there was no further disturbance. He says, as the fact is, that during that period he was interfered with in regard to his access to the site, and he says that the council are liable to him for damages for that. That is the question which has to be determined. His right in that respect is rested upon two grounds. The first ground is that there was a breach of an implied warranty given by the urban district council to Porter, which was either one of two things. The first implied warranty is an alleged warranty that Porter should be at liberty, during the ten months during which he was to build the schools, to work without interruption by anybody claiming to interrupt him; that when the council said by article 3 of the contract that he was at liberty to enter on their land, they warranted to him that he should be free so to do, not merely notwithstanding any act done by the other contracting party but further notwithstanding any act done by any third party who had nothing to do with the contract at all: that they warranted him against all the world that nobody would interfere with his having access to the ground. I can only say I can find no ground whatever upon which any such implied warranty can be rested. I asked Mr. Salter what he put it on, and he said he put it upon articles 4 and 5 of the contract. Article 4 was that the contractor was to be at liberty to enter on the defendants' land; and article 5 is that if he does not do the work within the time there shall be a penalty. In my view, no such implied warranty is to be found there at all. It is a startling proposition to say that if the building owner says to a builder "You shall be at liberty to enter upon my land in order to do your work there," that he is warranting him that no other person shall improperly interfere with him in coming there. What has the building owner to do with the wrongful acts of Rowley? It was wrongful as against the building owner, and as against the builder. There is no warranty given by the

contract, and no warranty to be implied from the contract, that the building owner warrants the builder against all the world that nobody will interrupt him. I dismiss that contention.

The second implied warranty is said to be this: that it is implied from the contract that all work to be done under the contract can be lawfully done. I agree that there is such an implication; but now from that it is sought to evolve this. Inasmuch as the builder was presently to build upon the site, and inasmuch as he was ten months hence to do something in the highway, therefore there was an implication that the building owner was warranting to him that he, the building owner, could presently—not ten months hence, but presently—give him possession of the portion of Keston Road. It seems to me that it is only necessary to state the proposition to show that it is ill founded. If I employ a man to do work upon land, no doubt he is entitled to say "Well, you impliedly have said that I can go there to do it"; but if I employ him to do work ten months hence upon land, it does not follow that it is to be implied that I warrant that he can go now presently upon that land. The implication is that "ten months hence, when you are to do that work, I warrant you that you shall be able to go there and do it." I gave, in the course of the argument, this illustration, and it seems to me exactly the same thing. A man acquires a plot in a street on which he is going to build a house; he is going to acquire the next door plot in order to make a garden; he enters into a contract with a builder who is also a garden and landscape expert, and the contract is in two parts: "First, you shall build me a house upon plot A in the course of the next twelve months. When the house is finished, you shall lay me out a garden upon plot B." Whereupon the builder goes into possession and says "The most convenient access to plot A is over plot B, so I shall go through plot B in order to reach plot A. You warranted me that you could give me the right to go on plot B." The building owner says "In twelve months time, yes. I am going to acquire plot B. twelve months hence, it is not mine now." This second implication seems to me to rest upon no ground at all.

The facts relied upon are these. It will be within the

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recollection of those who hear me that when the sleeper roadway was removed, that is to say when the work was over, the plaintiff was to do certain work in Keston Road—he was to alter the pathway, and lay down the granite setts. To my mind there is no implication to be inferred from that that until that time arrived the building owner would give him possession of that land or authorize him to do anything upon it. The official referee says: "Having regard to the terms of the contract, and also to the statements of the law in the decisions to which I am about to refer, it is in my opinion clear that there was an implied obligation by the defendant council on the making of the contract to give immediate possession of the whole of the site to the builder, and by giving possession is meant a free and uninterrupted access to the site." I do not agree.

The second matter is one which, so far as I see, was not pressed before the official referee. The appellants say they did not press it because the official referee was with them on the first ground, and therefore they did not want the second. But it is open to them here. It was raised before the Divisional Court, and it was raised before us. It was said that when the intervention of Mr. Rowley occurred on March 5 the defendants made to the plaintiff a request that he should stop the work; that inasmuch as Rowley had intervened and said "I have certain rights in respect of this," the defendants said to the plaintiff "Well, we request you under those circumstances to stop"; and upon that request there was said to be founded an obligation on their part to indemnify him. The short answer, I think, is that there is no evidence of any such request. I asked Mr. Salter to state whether that to which I am going to refer was the best material he had; and he agreed that it was. It is found on pp. 3, 4, and 7 of Mr. Porter's evidence. He said at p. 3 that there was an interview on March 6 and a discussion took place. "Can you tell the official referee the upshot and substance of what took place and what you would do? (A.) The substance of it was that I was to cease using that road for the present, that entrance I should say." Then he was cross-examined, and on p. 9 in cross-examination he is asked: "I want to ask you about a later date. I put it to you, before I

come to the later date, that on March 6 you were not told in terms that you were to stop work? (A.) I will not say that I was told in terms to stop work, but it was implied, and I left the office thinking, or knowing, that I was to cease using the road, using the entrance. (Q.) Who led you to believe that? (A.) The conversation with the solicitors. (Q.) Surely something must have been said? (A.) There is no doubt it was said. (Q.) Can you tell me what it was? (A.) I cannot remember. (Q.) You cannot remember that? (A.) No, I cannot remember the conversation." There was no request proved at all.

The only other matter, and the more substantial point, if it were relevant, but I think it is not, is on p. 4. It will be remembered that the builder put down sleepers on this ground. Mr. Lambert was the assistant engineer to the council. On p. 4 Mr. Porter was asked this: "Did Mr. Lambert call and give the instructions to take up those sleepers, I think before eight o'clock the next morning? (A.) Yes. (The official referee.) Who gave you instructions? (A.) Mr. Lambert, the assistant engineer to the council." So there is no doubt that the defendants did give him certain instructions, and those instructions were to take up these sleepers, which everybody agreed ought never to have been put down. But there was no request to abstain from using the ground. The only request was not to use the sleepers on the ground. Then was any promise made by the building owners? Certainly not in my view. On April 4 Mr. Burrows wrote to Mr. Shelton: "I have seen my client on your letter of yesterday. He instructed me to ask Messrs. Bury for an assurance that they will not proceed against him and to ask your client for an express request to resume the work with the necessary indemnity." The defendants did not accept that invitation, and they gave no indemnity. They left the plaintiff to take his own course in the matter. This ground, therefore, of there being a request seems to me also to fail.

A further ground put was this. It was said that, in order to make this access from Keston Road to the building site practically available, it was necessary to lay sleepers. The ground was soft, and you could not travel over the ground, with the

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amount of traffic there would be for the purpose of this building, without supporting the road by putting sleepers and making a harder road. In the first place, I do not see that there is any evidence to support that. The evidence is that the soft ground was used to a large extent by a number of carts. The evidence is that it would be a mere question of using additional traction power, by putting on another horse with a chain, in order to drag the carts. So that the laying down of sleepers was not a thing without which the contract was impossible; but was a thing the doing of which would render the carrying out of the contract more easy.

Another point was that there was it is said a practical necessity to lay sleepers, and the builder could not legally lay sleepers. Therefore the circumstances had wholly altered, and *Bush* v. *Whitehaven Trustees* (1) and *Jackson* v. *Union Marine Insurance Co.* (2) are applicable. The contract it is said had ceased to be applicable to the circumstances; the thing was left at large; and the builder is entitled to a quantum meruit; involved in that is the question of the delay. I do not think that those cases have any application to this case. The true position was that the contract had continued to be applicable in its entirety. The suggestion seems to be this. The proposition sounds extreme, but the proposition really is this. If there be, as between A. and B., a contract which involves the doing of certain work, and C. intervenes and says "I have some legal right, by the user of which I can prevent you, B., from performing your contract, and I will employ that against you so that you shall not perform your contract," then A. becomes liable to B. because C., a third party, has intervened and said "You shall not perform your contract; I am going to stop you." It appears to me that, if C. does so intervene, it is the common misfortune of A. and B. Rowley no doubt put all the parties to considerable trouble and considerable delay, but that was not A.'s fault; it was not here the defendant council's fault. It had nothing to do with them. A person who was a third party made what turned out to be a baseless claim. He said, and succeeded in saying, "Having regard to my claim, I will exact from you an

(1) 52 J. P. 392. (2) L. R. 10 C. P. 125.

undertaking," which unfortunately Porter gave; and said "I will stop your work." The result was that Porter suffered damage. In my opinion the district council were not responsible in any way for Rowley's acts, which caused the delay. I do not find anything in the relation between the parties which shows that the building owner gave this alleged warranty. The building owner no doubt owed to the builder an obligation to do all acts so far as he, the building owner, was concerned to enable the builder to perform his contract with him. But he was in no default. Somebody else intervened, and for the act of that intervening party the building owner is not responsible.

In these circumstances I think the appeal fails and must be dismissed with costs.

PHILLIMORE L.J. Three points were taken by counsel for the appellant, the builder. The first was that there was an implied warranty in the contract that the builder should be at liberty to work uninterrupted, not only so far as the owners, the urban district council, were concerned and people claiming under the urban district council, but also so far as people who challenged the title of the urban district council were concerned. I do not think that there is any such implied warranty.

The third point—I pass over the second for the present—was that in the circumstances of the claim put forward, at any rate in part, wrongly by Rowley, there was a request by the urban district council to the contractor to stop his work; from which request it would follow that there would be an implied promise to make good to the contractor any expense or loss which he thereby suffered. If there was such a request, whether made with reason or without reason, because of substantial fear of Rowley or without any substantial fear of Rowley, and the contractor had complied with that request, I think he would be entitled to recover from the urban district council the cost or expense to which he would thereby be put for having delayed in compliance with their request; but for the reasons given by the Lord Justice I think the evidence falls short of there being any such request to stop the work. There was a request to take out the sleepers which Porter, the contractor, had put down, but that

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is another matter. Therefore I think the first and third grounds fail.

The second one is a more difficult one and requires a good deal of consideration. It is this. There is an implied warranty in this contract that "all the work I am asking you to do you can lawfully do without getting the consent of any outside party, unless in so far as that consent is expressed as a condition in the contract." Or, to put it in another way, there is in all these contracts an implied promise by the building owner that he will put the contractor into full, free, and, unless otherwise qualified, immediate possession of the land on which he was to build or work. I think there is, in the absence of express words, such an implied warranty, and I am inclined to think that there was something in the nature of an express warranty in this contract. Paragraph 1 describes the work which the contractor is to do. He is to do it upon land belonging to the urban district council at West Green, Tottenham, in the county of Middlesex. The work he was to do was to build a school on the land of the urban district council. It was to be built at the far end of the land at a place where there was an access to it, and he was to put a sleeper road down from the entrance to the land up to the school. I agree with Mr. Macmorran that nothing was said as to his putting down any sleeper road outside the entrance to the land which the urban district council held for a school: but if the highway outside, a highway as it was found to be, had become a street, then within s. 149 of the Public Health Act, 1875, if that was applicable, or, if not, within whatever is the corresponding section of the Tottenham local Act, which we were told was substantially in similar language, so much of the surface of the highway would become vested in the urban district council as would give them possession for the purpose of having that work done upon it which the contractor was given a right to do or have done for them. To that extent also that land might also be described as land belonging to the council; and I confess, having regard to what everybody must know to be the law on this subject, I have no doubt myself that that was the representation, that not only the school and the sleeper road up to the school, but the particular paving, what one may call the side-

walk or pathway of Keston Road at the entrance of the gates, would be done upon land belonging to the urban district council. If this had been a contract which we could construe as meaning that the contractor was to be put at once in possession of all the land at the same time, uno flatu, I think the appellant would have a very strong case: but any contract of this kind which describes work as being done upon the owner's land will be satisfied if, by the time that the contractor is entitled to reach a particular piece of land, that land has been acquired by the owner, or the necessary rights in it have been acquired by the owner, even if the owner had not the rights at the time of making the contract. If there had been no clause in these bills of quantities making any provision as to when this work, which I will call for shortness the work of laying granite setts in the footway, was to be done, I think the contractor would be entitled to say "I choose to do this first, or I choose to be in the same position as if I did it first. I am entitled to that land from the beginning, and you have broken your express contract with me if I have not occupation of it." Now it is common ground that at the time when this contract was made this was not land, even in the sense of s. 149, belonging to the council. It was land which, as the events have proved, was a highway—land over which the public had a right of passage, and land across which, with the consent of the urban district council, carts might be drawn with or without materials on to adjacent land; but it was not taken over by the council, and it had not become a street within s. 149, and it had not become in any way vested in the council so that they could license any interference with the soil of it. All that they could do was to give a licence, if a licence were necessary, to enable any adjacent owner to draw across it as well as to draw up and down the road. The moment the land did become a street, the whole question of paving with granite setts, or otherwise, was one for the urban district council; and from that moment the urban district council might allow any temporary form of paving or any temporary roadway, such as sleepers or otherwise, which they thought proper.

The difficulty in this case is this. As I have said, it is now the respondents' case, quite as much as the appellant's case, that

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the sleepers which the contractor laid down, and which he was requested to take up on the 7th, were sleepers that they had no business to lay down, because Rowley, as the owner of the soil, who had only dedicated the right of way at that time to the public, was entitled to say "There shall be no interference with my soil." If Porter had been entitled to the possession of this land, not merely for the purpose of passing over it, so that he could interfere with the paving and put the paving which the urban district council required, almost a fortiori he would have been entitled to take the sleeper road across the same piece. Well, the answer which on the whole prevails, the answer which at any rate satisfied both my colleagues, and which I am not disposed therefore to differ from, particularly as it is on the construction of a particular contract and not on a matter of general law, is that we are to infer from these bills of quantities that there is no expectation that the builder will do the granite setts until he has done not all, but a good part of, the other building. I do not think, if I may criticize, that it is right to say that he is not to do it for ten months; he may do it as soon as ever he pleases. He must do it within ten months; and therefore he must start it before the ten months have expired. He may do it as soon as ever he pleases, provided always that if for any particular reason he is so far advanced with the rest of the building that he has taken up the internal sleeper road, from the moment after he had taken up the internal sleeper road, he was entitled to go to the council and say, "Gentlemen, let me come and put the setts on that piece of land." It might have been within a comparatively short time, but it probably would not have been for some months, and at any rate fortunately for the urban district council, by the time he did require to do it, the controversy had disappeared; and it is clear that in all probability the urban district council would have possessed sufficient of this land to enable him to do it. It is upon that ground, and only upon that ground, that I see my way to assent to this appeal being dismissed.

With regard to all the rest of the case the appellant fails; though I think it is an extremely hard case upon him, and I cannot help thinking that it is some reflection on our system of law that he should have in the circumstances no remedy.

Be that as it may, I do not think he has any remedy in the circumstances.

There was one other form in which the point was put. But again that, like the request point, broke down on the evidence; the evidence does not support it. The contractor was bound by his contract to come in through this entrance. The state of the ground was known to both parties. The necessity of sleepers on the soft ground inside was so recognized that it was not left to the contractor to do it or not at his own will and pleasure; but he was bound to lay a sleeper road, so that he should not cut up the ground too much. This outside piece of ground was the half of Keston Road which had never been made up, and in all probability the soil was as soft outside as it was in. It was suggested that it was necessary for the contractor, in order to draw over this soft footway or supposed soft footway, to have the sleepers laid so that he could draw over them. If that had been proved, then again I think the contractor might have succeeded; because there is unquestionably a warranty here that the man could legally execute the work; and if it had been a necessity to execute the work that he should put down sleepers across the pathway, then there would have been a warranty that he could legally do it. But the evidence breaks down on that point. It is a point which, like the other point, was I am afraid raised, or largely raised, for the first time here; and so far as it was raised before, the evidence falls short. It would be inconvenient, onerous, and expensive for the contractor to draw over this piece of road without having sleepers laid down, at any rate from the time when he was entitled to work, namely, in the month of March; because we are not entitled to argue from the month of May to the month of March, when there is no sufficient evidence that he could not have done it, or even that he could only have done it at such expense as to make it unnecessarily impracticable. Therefore that sub-division of this point also fails the contractor; and upon the whole I agree that this appeal should be dismissed.

PICKFORD L.J. I am of the same opinion. The plaintiff rests his case here upon four points, as I understand them. First, upon one or other of two implied warranties arising from the contract,

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that is to say, damages for breach of the contract and its implied terms. The first of them is an implied warranty that he would be able to do his work without interruption—not without interruption from the defendants, or anybody claiming under them, but without interruption. Mr. Salter did qualify it by saying without interruption from anybody who was attacking the defendants' title. I cannot see that that limitation can be placed upon it. If you once travel beyond the warranty against interruption from the defendants or anybody claiming under them, it becomes a general warranty against interruption by any cause. In my opinion that was the only ground which was raised in the pleadings to begin with. It was the only ground apparently upon which the official referee decided, and it was the only ground on which a decision was given in the Divisional Court; and it was the only ground, so far as I can see, that was seriously argued there, judging simply by the report of the argument. The next point I am going to mention may have been mentioned there, but it does not seem to me to have been seriously argued. I agree that no warranty against an unfounded claim by Mr. Rowley to prevent access over this part of Keston Road can be implied. The defendants had nothing to do with Rowley. In fact what Rowley did with regard to this matter was done entirely in wrong of the defendants; and I cannot see any implied warranty against acts of some entire wrong-doer, as Mr. Rowley in that respect was.

The next implied warranty that was suggested was this. Even if there were not a warranty against the interruption of the work and of the access by anybody, there was at any rate this implied warranty: that the plaintiff should be able to carry out the work in a way that was what is called commercially possible. It was said that it was not commercially possible to carry out the contract unless a sleeper roadway were put down over the part of the public road which led into the defendants' school premises; and that therefore there was a warranty that the defendants had power to allow the plaintiff to lay down such a sleeper roadway over that part of Keston Road. As I say, that point seems to me really to come up in this Court for the first time in any serious form; and I cannot see, upon

the provisions of this contract, that there was any such warranty, even assuming that it was necessary, to lay the sleeper roadway—that is to say, that unless it were laid the work could not be done. Both parties could see the road as it was. They could see that it was soft ground, and so far as that goes, apart from the terms of the contract, to which I shall refer in a moment, I should say that each of them took their chance of it. Then what is said is this. The contract provides that the plaintiff should do for the defendants certain paving work upon that part of Keston Road; and, therefore, as it is provided that paving work should be done upon that part of Keston Road, there was an implied warranty that the defendants were able to authorize the plaintiff to lay down a sleeper roadway upon that bit of ground. It is necessary to look at the terms of the contract to see if that be so. The first relevant thing is this. After describing what is to be done upon the defendants' school premises, it then continues: "The following works are to be executed in the public roadway and are all to be done to the satisfaction of the authorities or owners, or pay them their charges for doing same." Then follows the removing of certain granite kerbing, and the substitution of other, and various other work. At the beginning of the contract it is provided that "the work to the Keston Road entrance and the new pathway to the site and the fences and other works in connection is not to be executed until the sleeper roadway is removed." That in substance means until the end of the work; because the sleeper roadway was laid down over the school site in order to facilitate carting, and as long as there was carting of any sort or description going on, the sleeper roadway would be kept down; and it would not be until the end of the work that it would be removed. Therefore, the contract stipulation was that at some period many months after the date of the contract certain work was to be done upon that part of the road. As a matter of fact, the defendants did acquire full authority over that part of the road before the ten months would have expired in any circumstances. It does not seem to me, from a contract of this kind, that there can be implied more than this: that when the time comes which is stipulated in the contract for doing the work, and before which it

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cannot be done, there will be authority in the defendants to allow it to be done. They will be in a position, in fact, to put that ground at the disposal of the plaintiff for the purpose of the work being done. It seems to me it is going a great deal too far to say that from that you can infer that they have at the moment authority to allow the plaintiff to do something which is not specified as necessary to be done in the contract at all. I think that point also fails.

With regard to the question of a request, which is the third point, by the defendants to the plaintiff to stop the work, from which a promise of indemnity can be inferred, it is only necessary to say that I agree with the Divisional Court and the other members of this Court, that there is no evidence to support such a request; and therefore as to that, which is a pure matter of fact, the appeal also fails.

The fourth and last point is a claim founded upon the case of *Bush* v. *Whitehaven Trustees* (1), which is really to this effect: that the change of circumstances since the making of the contract has been so great that the special conditions in the contract are no longer applicable; and that, therefore, the contract must be discarded altogether, but that, as the defendants have taken the work, they must pay a quantum meruit; and that means to say that in this case they must pay the additional sum which has been caused by the delay. That is a point which does not appear upon the pleadings, which did not appear before the official referee, which was not mentioned before the Divisional Court, because Mr. Salter only cited *Bush* v. *Whitehaven Trustees* (1) upon another point, which comes up here for the first time. Of course, that does not prevent the plaintiff from taking it. It may lead one to suspect, perhaps, that it is not a very good point, or it would have been taken earlier; but that is the only effect, as it seems to me, of its not being taken earlier, except this, and this does seem to me to be important. That is a contention which requires for its foundation a finding, to use the words of Lord Coleridge, that the circumstances under which the contract was made have changed, and the conditions of the contract have changed and its terms have become impracticable; or, in the

(1) 52 J. P. 392.

words used by Brett J. in *Jackson* v. *Union Marine Insurance Co.* (1), that "where a contract is made with reference to certain anticipated circumstances, and where without any default of either party it becomes wholly inapplicable to or impossible of application to any such circumstances, it ceases to have *any* application; it cannot be applied to other circumstance which could not have been in the contemplation of the parties when the contract was made."

It cannot be applied to other circumstances which could not have been in contemplation of the parties when the contract was made. It is sometimes expressed that the adventure has been frustrated; it is sometimes expressed that the subject-matter of the contract has gone. But, as I say, however you express it, it requires a finding of the facts to the effect of those propositions which I have stated from Brett J. and Lord Coleridge C.J. The official referee was never invited to come to any such finding, and he never did come to any such finding. I doubt whether he would ever come to any such finding, because the first thing he has to find that it was commercially impossible to perform this contract without putting down a sleeper roadway. As a matter of fact, he has only given damages up to a time a fortnight before the sleeper roadway was allowed to be put down for the second time, and he has, therefore, found that during that fortnight inferentially it was possible to go on without the sleeper roadway. I know his mind was not upon this point; but it seems to me the plaintiff could not raise that point without a finding of fact of that kind in his favour. We are asked to find it. I do not myself think that the evidence supports anything of the kind. If the evidence in this case would support a finding of that kind, you might say in every contract in which there has been delay "The bottom of the contract is out, and we must go on without any contract at all." I do not think that the plaintiff could raise that here without the necessary finding of fact. Mr. Salter did suggest that the case should be sent back to the official referee to find that fact, which I think would not be a right thing to do, considering the course the case has taken; but if it were sent back, in my opinion there is no indication that any one could properly

(1) (1873) L. R. 8 C. P. 572.

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find that any such thing had taken place. Therefore I think that ground fails also; and that upon all these grounds the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Hutchison & Cuff.*

Solicitors for respondents: *Howard & Shelton, for Francis Shelton, Tottenham.*

W. J. B.

1915
Feb. 8, 9, 15.

QUIRK *v.* THOMAS (EXECUTOR OF).

[1913 Q. 2562.]

Marriage—Breach of Promise—Action against Executor of Promisor—Special Damage—Business given up in Consideration of Promise to Marry—Abatement of Cause of Action—Actio personalis moritur cum persona—Personal Action.

The plaintiff in an action for breach of promise of marriage against the executor of the promisor claimed as special damage loss suffered by her through having given up a profitable business at the request of the deceased and in consideration of his promise to maintain her till marriage and to marry her. The jury having found a verdict for the plaintiff:—

Held, that the action did not lie, on the grounds (1.) that the fact that it was a term of the contract by the deceased to marry the plaintiff that she should give up her business and that he should maintain her did not prevent the action from being a personal action, and, therefore, one which could not be maintained against the executor of the promisor; and (2.) that the loss sustained by the plaintiff was not special damage flowing from the breach of the promise of marriage.

Dicta in *Finlay* v. *Chirney* (1888) 20 Q. B. D. 494 not followed.

FURTHER CONSIDERATION of an action tried by Lush J. with a jury.

The action was brought to recover damages for breach of promise to marry. After the issue of the writ and before the statement of claim was delivered the defendant died. The action was continued against his executor, the claim being confined to special damage alleged to have been suffered by the plaintiff. The plaintiff alleged that in May, 1910, the deceased promised to marry her, and asked her to give up the

business of a milliner which she was then carrying on at a profit, and the plaintiff in pursuance of this request and in consideration of the deceased's promise to marry her and to maintain her till they were married agreed to give up her business; and she gave the same up in consideration of and in reliance upon the promise to marry her. The special damage alleged was the loss of the business and of the time and labour spent in acquiring and developing it, and the income which the plaintiff would have derived from the profits of the business if she had not given it up. Between the date of the promise and the date of the breach the deceased paid to the plaintiff several sums of money.

The jury by their verdict found that the plaintiff had suffered special damage by reason of the deceased's breach of promise, and they assessed the damages at 350*l.*

Barnard Lailey, K.C., and *J. H. Watts*, for the defendant. An action for breach of promise of marriage does not lie against the executor of the promisor, even though special damage resulting from the breach be proved. The action is a personal action within the meaning of the maxim actio personalis moritur cum persona. The maxim is not confined to torts; it applies also to breaches of contracts of a personal nature as distinct from contracts relating to property: *Hambly* v. *Trott* (1); *Twycross* v. *Grant* (2); Pollock on Torts, 9th ed., pp. 63, 73.

[LUSH J. referred to *Phillips* v. *Homfray*. (3)]

Special damage is only an element in the consequences of the breach of the promise. There is only one cause of action, whether the damages are general or special or both, and it is the cause of action, not the claim for general damages, which abates on the death of the promisor. In *Chamberlain* v. *Williamson* (4), where the administrator of the deceased party was the plaintiff, and in *Finlay* v. *Chirney* (5), where the executor of the promisor was defendant, it was held that the action for breach of promise of marriage could not be maintained in the absence of special damage, and the American decisions cited in the latter case are to the same effect; but there is no reported case in which it has

(1) (1776) 1 Cowp. 371.
(2) (1878) 4 C. P. D. 40.
(3) (1883) 24 Ch. D. 439.
(4) (1814) 2 M. & S. 408.
(5) 20 Q. B. D. 494.

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been decided that, if special damage is proved, the action will lie, and the observations of Lord Esher M.R. and Bowen L.J. to that effect in *Finlay* v. *Chirney* (1) were dicta only.

Secondly, the special damage alleged in this case, namely, the loss of business, was not special damage resulting from the breach of promise. The plaintiff gave up her business in consideration of the promise to marry her. The loss of business was in no way caused by the failure of the deceased to carry out his promise; the result would have been the same if the marriage had taken place. As Lord Esher M.R. pointed out in *Finlay* v. *Chirney* (2), it is difficult to see how there can be any special damage in the strict sense of the word resulting from a breach of promise to marry. The real and substantial injury is the refusal to give the status of marriage. In assessing the general damages a jury may take into consideration the fact that the plaintiff has in contemplation of the marriage given up a business, but that does not make the loss of business special damage. Lastly, there was no evidence fit for the jury that the plaintiff had suffered the alleged or any damage from giving up her business.

Waugh, K.C., and *J. D. Crawford*, for the plaintiff. There was evidence of special damage and the jury have found that the special damage alleged was in fact caused by the deceased's failure to perform his promise to marry the plaintiff. That being the case, the action is maintainable against the executor. If a man in his lifetime commits a breach of a contractual obligation which he owes to another person with the result that the property of that other is damaged, then in the event of the death of the party committing the breach his estate is liable to make good the damage: *Bradshaw* v. *Lancashire and Yorkshire Ry. Co.* (3) That was a case of injury to the estate of the deceased person, but the same principle applies where, as here, the injury has been caused by the deceased.

[LUSH J. The correctness of the decision in *Bradshaw* v. *Lancashire and Yorkshire Ry. Co.* (3) was questioned in *Leggott* v. *Great Northern Ry. Co.* (4)]

(1) 20 Q. B. D. 494.
(2) 20 Q. B. D. at p. 499.
(3) (1875) L. R. 10 C. P. 189.
(4) (1876) 1 Q. B. D. 599.

It was followed and approved of in *Daly* v. *Dublin, Wicklow and Wexford Ry. Co.* (1) The maxim actio personalis moritur cum persona only applies to actions arising out of tortious acts and not to wrongs ex contractu: *Pulling* v. *Great Eastern Ry. Co.* (2) The distinction between torts and contracts for this purpose may perhaps be illogical, but it was the basis of the decision in *Bradshaw* v. *Lancashire and Yorkshire Ry. Co.* (3); see also *Knights* v. *Quarles.* (4) An action for breach of promise of marriage in which special damage is proved is not a personal action within the maxim. *Finlay* v. *Chirney* (5) has always been treated as an authority for the proposition that if there is special damage the action will lie: Lord Halsbury's Laws of England, tit. Executors, vol. 14, pp. 225, 305; Bullen and Leake's Precedents of Pleading, 6th ed., p. 171; Leake on Contracts, 6th ed., p. 931; Addison on Contracts, 11th ed., p. 1316.

[LUSH J. referred to *Peek* v. *Gurney.* (6)]

As to the special damage, the plaintiff gave up her business in consideration of the deceased's promise to marry her and to maintain her until the marriage took place. The promise to marry her was broken, and the plaintiff got nothing in return for giving up her business. The loss of the business is, therefore, special damage resulting from the breach of promise. In *Finlay* v. *Chirney* (7) Lord Esher M.R. said that "if at the time of the contract to marry the plaintiff had agreed to give it"—i.e., a better place—"up at once or before the wedding day, it might be special damage, as being part of the consideration for the promise to marry."

If there is a contract to buy real estate, and the vendor makes default, the purchaser can recover as special damage the expense which he has incurred in investigating the title, though that is not strictly speaking a loss flowing from the breach. In cases of breach of contract, as distinguished from tort, "the law does not consider too remote damages which may be reasonably supposed to have been in the contemplation of the parties when

(1) (1892) 30 L. R. Ir. 514.
(2) (1882) 9 Q. B. D. 110.
(3) L. R. 10 C. P. 189.
(4) (1820) 2 Brod. & B. 102.
(5) 20 Q. B. D. 494.
(6) (1873) L. R. 6 H. L. 377.
(7) 20 Q. B. D. at p. 501.

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the contract was made": *Cobb* v. *Great Western Ry. Co.* (1), per Bowen L.J.

Barnard Lailey, K.C., replied.

Cur. adv. vult.

Feb. 15. LUSH J. read the following judgment:—This action was brought by the plaintiff to recover damages for breach of promise of marriage. Before the pleadings were delivered the defendant died. The action was continued against his executor, but the claim was confined to the special damage which the plaintiff alleged she had suffered through the breach by the testator of his promise to marry her. I left certain questions to the jury, reserving the questions of law which had been raised as to the plaintiff's right to recover. The jury in answer to those questions found that the deceased promised to marry the plaintiff in June or July, 1909, and on June 6, 1910, and also found that the plaintiff had suffered special damage, and they assessed the damages at 350*l*. I directed the jury to treat the damage, which the plaintiff asserted she had suffered, as special damage for the purpose of their verdict. I took this course because I thought that in a case of this nature more especially it would be most undesirable to risk a second trial in the event of my holding that the action does not lie and that view proving to be wrong.

The questions of law have since been argued. They are these. First, does an action lie against executors to recover special damage caused by the breach during the lifetime of the deceased of a promise to marry the plaintiff; secondly, if so, was the damage which the plaintiff said she had suffered special damage for this purpose; and thirdly, was there any evidence of such damage at all?

The special damage relied on was this. The plaintiff asserted that she had been carrying on a profitable business in the sale of hats on the premises of a milliner who had a large and good business connection, the plaintiff obtaining the benefit of this connection, and that she gave up that business on June 6, 1910, in consideration of the promise by the deceased that if she did so he would "take care of her," or "take care of her until they

(1) [1893] 1 Q. B. 459, at p. 464.

married" (it was not clear which), and would marry her. I felt some doubt whether any real pecuniary loss was proved, or whether there was sufficient evidence of such a bargain in consideration of a promise to marry. The deceased was already under a promise to marry the plaintiff, as the jury found, and she seemed to have already given up her business, or it appeared to have come to an end at all events as a business of any value. I think, however, on the whole that there was just sufficient evidence to justify my leaving the question to the jury, and the defendant's contention on this point therefore fails.

The other two questions are of considerable difficulty. They were raised and discussed in two cases in England, *Chamberlain* v. *Williamson* (1) and *Finlay* v. *Chirney* (2), and in four cases in the American Courts which are cited in *Finlay* v. *Chirney*. (2) The actual point decided in all these cases was that without proof of special damage an action for breach of promise does not lie against executors. It has never been actually held that a plaintiff in a case like this was entitled to succeed. In *Finlay* v. *Chirney* (2) the plaintiff was allowed to give particulars, verified by affidavit, of the special damage on which she relied, and the Court of Appeal held that it was not sufficient. The Court suggested, but did not actually decide, what might be sufficient. Lord Esher, however, at p. 499, expressed grave doubt whether any special damage could arise which would support such an action, and said that he could "hardly conceive" of such a case, adding, at p. 500, "I think it can only exist in cases where the plaintiff can show that, besides the promise to marry, there was t the time of the making of the contract another promise affecting the personal property of the one party or the other," and a little further on, "and even though there were no such express promise, yet if circumstances were proved to exist showing that both the parties contemplated that a breach must affect the property of one or the other, an action might be brought; that is to say, if the case were within the rule laid down in *Hadley* v. *Baxendale* (3), an action would lie in respect of a damage to property or a loss of money through the breach." As a possible

(1) 2 M. & S. 408. (2) 20 Q. B. D. 494.
(3) (1854) 9 Ex. 341.

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instance of special damage Lord Esher said that, if at the time of the contract to marry the plaintiff had agreed to give up a better place or employment and did give it up, it might be special damage as being part of the consideration for the promise to marry. Bowen L.J. and Fry L.J. suggested that the purchase of a wedding trousseau might in certain circumstances constitute special damage.

In this state of the law, the decisions being as I have stated, I must, I think, consider myself free to decide whether such an action as this can be brought to recover special damage such as the plaintiff alleges she proved. What has happened in this case is what Lord Esher suggested might be special damage sufficient to support an action. I cannot, however, regard what was stated by Lord Esher as a decision, or intended to be a decision, which binds me. It was only an indication of what might be sufficient to support such an action, and while giving all weight to so high an authority I must determine the question for myself. In order to arrive at a conclusion as to whether it is sufficient, it is, I think, necessary to consider what is the true meaning and scope of the maxim actio personalis moritur cum persona, and what test is to be applied in determining whether in any particular case a claim for damages for a breach of contract is maintainable against executors. The reason why general damages cannot be recovered is that a promise to marry gives rise to personal obligations only by both the contracting parties, and executors do not represent the person but only the "debts and property" of their testator, as Bowen L.J. said in *Phillips* v. *Homfray* (1), or, as Lord Chelmsford said in *Peek* v. *Gurney* (2), an executor is only answerable for his testator's acts "in respect of his estate." It is stated in Bacon's Abridgment, "Executors" (P) 2, that "the taking up of an executorship is an engagement to answer all debts of the deceased, and all undertakings that create a debt, as far as there are assets; but doth not embark executor in the personal trusts of the deceased; nor is he obliged to answer for his several injuries; for none can tell how they might have been discharged or answered by the testator himself." The words "debts" and "personal trusts" are clearly not used in their

(1) 24 Ch. D. at p. 456. (2) L. R. 6 H. L. at p. 392.

ordinary or strict sense, and the real question seems to me to be what are the obligations which affect the estate of the person who is subject to them or who has undertaken them, and what are those which affect his "person" only so that they do not bind his representatives after his death. It is clear enough that in cases of tort, where the duty which was broken was a personal duty only, no other duty or obligation having been undertaken by the wrong-doer, the tortious act does not at common law impose any liability on the executors, whether the party complaining suffered pecuniary loss or special damage or not. "As regards all actions essentially based on tort," said Bowen L.J. in *Phillips* v. *Homfray* (1), "the principle" (that is actio personalis moritur cum persona) "was inflexibly applied." That this was so whatever the damage may have been was recognized as clear in *Peek* v. *Gurney*. (2) The principle applied even to an action of trover (*Hambly* v. *Trott* (3)), and to a claim for damages for fraud which induced the claimant to purchase shares which turned out to be valueless: *In re Duncan*. (4) There was an apparent, not a real, exception to this rule in the case of a tortfeasor whose estate had gained a benefit by the tort. In that case the injured person could follow the property acquired by the testator and obtain satisfaction out of his assets. This is in accordance with the principle and not in conflict with it. The executors representing the estate are accountable for the benefit improperly obtained. The case is analogous to that of an infant who has acquired property through a contract he had no power to make and which can be followed in his possession. The executor of the tortfeasor was not in any sense liable on the tort, nor is an infant liable on the contract. This common law principle as to an executor not being liable to be sued for his testator's torts has been modified by statute, for by 3 & 4 Will. 4, c. 42, it was enacted that an action of trespass, or trespass on the case, may be brought against executors for any wrong committed by a testator in his lifetime to another "in respect of his property real or personal," provided that the injury was committed six months before the death, and the action must be

(1) 24 Ch. D. at p. 456.
(2) L. R. 6 H. L. 377.
(3) 1 Cowp. 371.
(4) [1899] 1 Ch. 387.

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brought within six months from the taking out of probate or administration. This statute applies to torts only and not to breaches of contract. It is, I think, worth observing, although it does not directly affect the question that I have to decide, that in the converse case, namely, where the person whose property has been injured by the tort of another dies and his executors make a claim, the maxim has (subject to one authority to the contrary which I will mention in a moment) generally been considered as applying. To remedy this state of the law which was thought to be unjust a statute was passed in early days, 4 Edw. 3, c. 7 (amended by subsequent Acts so as to apply to the executor of an executor and to an administrator), permitting actions to be brought by executors to recover damages for certain injuries to their testator's property, and these statutes were, as Bramwell L.J. said in *Twycross* v. *Grant* (1), liberally construed and held to apply to "all torts except those relating to the testator's freehold, and those where the injury done is of a personal nature." Injuries to the testator's real estate are now subject to the same rule by 3 & 4 Will. 4, c. 42. Although this was the generally accepted view, namely, that the maxim applied as against the person injured as well as against the wrong-doer, the contrary view was taken in *Bradshaw* v. *Lancashire and Yorkshire Ry. Co.* (2), where it was held that the executors could sue for a pecuniary loss caused by the defendants' tort, the loss consisting of money expended in medical expenses and money lost through inability to attend to business, and that this right co-existed with the right to sue under Lord Campbell's Act. That case, however, is, so far as this point is involved in the decision, of doubtful authority. It was followed but disapproved in *Leggott* v. *Great Northern Ry. Co.* (3), and the Court of Appeal in Ireland in *Daly* v. *Dublin, Wicklow and Wexford Ry. Co.* (4), though approving the decision as to the two causes of action co-existing, put the right to sue for the pecuniary loss on the statutes and not on the common law, as was also the case in *Twycross* v. *Grant*. (1) It is difficult to see why the statute 4 Edw. 3, c. 7, should have been passed if the action lay at common law.

(1) 4 C. P. D. 40.
(2) L. R. 10 C. P. 189.
(3) 1 Q. B. D. 599.
(4) 30 L. R. Ir. 514.

I now turn to the question which more immediately concerns this case, and consider what the application of the maxim is to cases of contract, cases, that is, where the testator has undertaken obligations by contract, and here one gets into a region of some difficulty. What does a "personal" action or a "personal" obligation mean in this connection? The person who broke the contract may have only undertaken personal duties so far as his acts were concerned, as, for instance, if the contract was one for work and labour; but the matter has to be regarded from the point of view of the other contracting party also, and the contract may have affected his property or been a business transaction. In such a case it is clear that the obligations of the person who broke the contract are not "personal" within the meaning of the maxim. The actions which can be brought, notwithstanding the maxim, are thus defined by Lord Mansfield in *Hambly* v. *Trott* (1): "Where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator, by the work and labour, or property of another, or a promise of the testator express or implied; where these are the causes of action, the action survives against the executor." The words "contract to be performed" and "promise express or implied" must refer to contracts and promises with regard to such things as money, profit to be earned by work and labour, property, and matters of that kind, as contracts which are purely personal on both sides, for instance, a contract to marry, have always been subject to the operation of the rule, and if every contract or promise was intended to be outside that operation, the enumeration would have been unnecessary. But unless the contract did relate to property or to a transaction of a "business" character, or unless a debt was due on a trust or under a contract, the maxim would apply as in the case of a tort. It is a matter of only historical interest, but, as Bowen L.J. pointed out in *Phillips* v. *Homfray* (2), executors could not be sued at one time in all cases involving a claim for payment of a debt, for instance, on a simple contract for the payment of money. In that case the defendant could "wage his law," that is, bring his eleven neighbours to swear that they believed his denial that the

(1) 1 Cowp. at p. 375.

(2) 24 Ch. D. at p. 456.

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debt was owing to be true, and so get rid of his liability. Therefore the maxim applied, and the executors could not be sued, as they could not "wage their law." No better illustration could perhaps be given of the artificial and arbitrary character of the maxim as originally applied. This anomaly was defeated by the invention of new forms of action, assumpsit being substituted for debt, and it was finally put an end to by 3 & 4 Will. 4, c. 42, ss. 13 and 14, which abolished the old procedure and validated an action against executors on a simple contract.

Now, inasmuch as there is no obligation affecting property on either side in a contract of marriage, I fail to see how the fact that one of the parties suffered pecuniary loss or special damage from the breach of the contract can impose a liability on the executors of the party who broke the contract. If it be true, as I think it is, that the liability only attaches to the executors when a debt has been incurred, or when a contract has been entered into of the character mentioned by Lord Mansfield in *Hambly* v. *Trott* (1), it seems to me impossible to say that the existence of special damage caused by the breach can impose it where the obligations were purely personal on both sides. The executors do not represent the "person" of their testator, and are not concerned with the breach of his personal obligations, whatever the damage may be.

In the present case, however, there was, it is said, such a contract because the jury in effect found that the deceased on June 6, 1910, entered into the contract alleged by the plaintiff with regard to her giving up her business. Now, what was that contract and what was the true nature of the obligations which the deceased undertook under it? I do not think that that contract can be stated in the way in which Mr. Waugh stated it. He and Mr. Crawford said that it was a contract by which the deceased agreed that if the plaintiff would give up her business he would take care of her until they married and would marry her. A contract by a man to marry is not a contract of a commercial character, whatever additional term may be added to it; it is not a contract the consideration for which is the giving up of a business or employment by the woman. A contract to

(1) 1 Cowp. 371.

marry must be founded on mutual promises, and the contract asserted by the plaintiff was imperfectly and insufficiently stated in the form in which Mr. Waugh stated it. The promise by the plaintiff to marry the deceased was necessarily an essential term of the contract. Notwithstanding the arrangement or agreement under which the plaintiff gave up her millinery business, there was still, in my opinion, in reality and in substance one contract, and one contract only, namely, a mutual contract of marriage, and the term which was added providing for the maintenance of the plaintiff did not alter the personal character of the obligations on both sides. It is impossible, I think, to treat the parties as having contemplated that they were entering into a commercial or business transaction when they made this arrangement. The marriage contract remained a marriage contract and the personal obligations were still personal obligations and did not become commercial undertakings. But even if there were two contracts and if the contract to maintain the plaintiff must be regarded as a business transaction affecting the assets in the executor's hands, it is on that contract alone that he can be responsible, and if any action could be brought to recover damages against the executor it must, in my judgment, be brought for breach of that contract. Notwithstanding, therefore, the dicta to the contrary, I feel myself compelled to say that a pecuniary loss sustained by a woman through giving up an employment or business in contemplation of marriage or any similar loss sustained under such circumstances cannot, in my judgment, be properly treated as special damage flowing from the breach of the promise to marry. The plaintiff has not sued for the breach of the contract to take care of her, and she could not have done so, as Mr. Waugh admitted. The testator had in fact paid the plaintiff considerable sums since June 6, 1910, and the amount to be paid was, it seems to me, in the testator's discretion, and he paid her what he thought fit. Secondly, the contract was, I think, too vague to be enforced. Moreover, other defences might have been available on the facts if this contract had been sued on. But it is sufficient to say that it was not sued on.

There is in my judgment this further answer to the plaintiff's

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contention. What she is really seeking to do is this. She is claiming in addition to the sums that she has received the whole value of the business she gave up. That cannot, in my opinion, represent the damage she has suffered from the testator's refusal to marry her. The measure of damage must be the loss incurred through that refusal (excluding all exemplary or punitive damages) which has no relation to the value of the business. The loss of the business was not caused by and did not flow from the breach of the promise to marry at all. The loss was incurred on the faith of the two promises being fulfilled; it was not caused by the breach of either. The loss of the business would still have been suffered if the promise to marry had been performed. The fact is that the plaintiff under guise of a claim for special damage is really seeking to recover part of the ordinary exemplary damages which a jury could have given had the testator lived. In this kind of action the damages may be enhanced or aggravated by the conduct of the party who broke the promise, and a jury in my opinion would have been entitled, and would have been directed, in assessing damages to take into consideration the conduct of the deceased in persuading the plaintiff to give up her business on the faith of his promise to marry her, and the damages would have been enhanced by reason of that conduct. It is only in that way that the plaintiff could have been compensated for her pecuniary loss.

Under these circumstances and for these reasons I must enter judgment for the defendant.

Judgment for defendant.

Solicitors for plaintiff: *Cohen & Cohen.*

Solicitors for defendant: *Eland, Nettleship & Bull.*

F. O. R.

O'DRISCOLL *v.* MANCHESTER INSURANCE COMMITTEE.

1914
Dec. 3.

[1914 O. 175.]

Attachment—Debt—Fees payable to Panel Doctor—Public Policy.

An insurance committee, acting under the National Insurance Acts, 1911 and 1913, and the National Health Insurance (Medical Benefit) Regulations (England), 1913, entered into agreements with the panel doctors of their district by which the whole amounts received by the committee from the National Insurance Commissioners were to be pooled and distributed among the panel doctors in accordance with a scale of fees; the total amount available for medical benefit so received by the committee was to be the limit of their liability to the panel doctors; and if the total pool was insufficient to meet all the proper charges of the panel doctors in accordance with the scale there was to be a pro rata reduction for each doctor, and on the other hand if it should be in excess of the amount required the balance was to be distributed equally among the panel doctors:—

Held, (1.) that where a panel doctor has done work under his agreement with the insurance committee, and the committee have received funds in respect of medical benefit from the National Insurance Commissioners, there is a debt due or accruing from the insurance committee to the panel doctor which may be attached under Order XLV., r. 1, notwithstanding that as a matter of calculation the exact share payable to him may not yet have been ascertained; and (2.) that there is no principle of public policy preventing the attachment of such debt.

TRIAL of issue by Rowlatt J. without a jury.

On March 27, 1914, the present plaintiffs, who were the executors of one John O'Driscoll, recovered judgment against W. D. Sweeny, a medical practitioner in Manchester, for the sum of 246*l.* 15*s.* 6*d.* and costs.

As the judgment remained unsatisfied, a garnishee order was obtained by the plaintiffs on April 9, 1914, attaching all debts owing or accruing due to Dr. Sweeny from the Manchester Insurance Committee, to answer the judgment, and the garnishees were ordered to attend on an application by the plaintiffs for an order that they should pay the debts alleged to be due from them to Dr. Sweeny, or so much thereof as might be sufficient to satisfy the judgment.

On the hearing of the last-mentioned application it was ordered that the plaintiffs and the garnishees should proceed to

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the trial of an issue, and that the question to be tried should be whether on April 9, 1914, the garnishees were indebted to Dr. Sweeny in any and what sum. The plaintiffs affirmed and the garnishees denied that on that date the garnishees were indebted to Dr. Sweeny in the sum of 225*l.* 15*s.* 6*d.*, or, alternatively, if so indebted, that the amount due was in law capable of being attached.

By s. 59 of the National Insurance Act, 1911, it is provided that an insurance committee shall be constituted for every county and county borough. By s. 14 the administration of benefits is to be by approved societies or the insurance committee, and by s. 15 every insurance committee is required, for the purpose of administering medical benefit, to make arrangements with duly qualified medical practitioners in accordance with regulations made by the Insurance Commissioners who are constituted by s. 57 of the Act. By s. 30 of the National Insurance Act, 1913, every insurance committee constituted under s. 59 of the principal Act is constituted a body corporate and may sue and be sued.

By the National Health Insurance (Medical Benefit) Regulations (England), 1913, dated January 10, 1914, insurance committees have, by clause 4, for the purpose of providing treatment for insured persons, to enter into written agreements with such practitioners as are willing to undertake the treatment of insured persons on the terms of the agreement. By clause 35, sub-clause 2, where the committee have adopted a system of payment by attendance they are to credit to each practitioner on the panel, in respect of each service rendered by him, an amount calculated in accordance with the rate contained in his agreement with the committee, provided that if the panel committee (i e., a committee of medical practitioners) so require the accounts of practitioners shall be submitted to the panel committee, who shall be entitled to reduce or disallow any item of any account, and the sums to be credited to practitioners are to be based on the accounts as so adjusted by the panel committee. By sub-clause 3 of the same clause it is provided that the insurance committee shall ascertain the aggregate amounts so credited to the practitioner, and the aggregate amounts so

credited to all practitioners on the panel, and shall pay to each practitioner an amount bearing the same proportion to the sum credited to him as the amount in the practitioners' fund (after certain deductions) bears to the aggregate amounts so credited to all the practitioners. By clause 37, as soon as may be after the expiration of each quarter the committee are to pay to each practitioner such sum as may be agreed between the committee and the panel committee in advance of the amount due to him, without prejudice, however, to the power of the committee, at such other times as they may think fit, to pay to a practitioner such other sums on account as they may determine, and pay the balance of the amount so due as soon as may be after the expiration of the year.

In fulfilment of the duties cast upon them by the Acts and regulations the Manchester Insurance Committee (the garnishees) entered into agreements with medical practitioners in Manchester, including Dr. Sweeny, for the provision of medical attendance to insured persons. By the agreement with Dr. Sweeny, which was in the same terms as that entered into with the other panel doctors in Manchester, the garnishees undertook that the total sums available for medical attendance and treatment, namely, 6*s*. 6*d*. per head for twelve months for each insured person and 6*d*. per head for twelve months for the domiciliary treatment of insured persons suffering from tuberculosis, should be ascertained and the total sum should be pooled and distributed among the panel doctors in accordance with a scale of fees or remuneration to be settled by the garnishees and a committee of doctors selected by the panel doctors. The total amount available was to be the limit of the liability of the garnishees (except for drugs and medical appliances), and each doctor accepting service had to give an undertaking that he would not make any claim or bring any action against an insured person or the garnishees for additional payment. The agreement further provided that if the total pool was insufficient to meet all the proper charges of the panel doctors in accordance with the scale there was to be a pro rata reduction for each doctor, and, if it should be in excess of the amount required, the balance should be distributed equitably at the discretion of the committee of

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panel doctors. The account of each panel doctor was to be submitted by the garnishees to the medical committee, who were to examine it and certify the amount as passed by them and then send the account to the garnishees for payment out of the fund.

Dr. Sweeny served under his agreement as a panel doctor in Manchester for the years 1913 and 1914. In respect of the year 1913 the garnishees paid by way of provisional payments to panel doctors as much as the funds at their disposal enabled them to pay. Various sums were thus paid to Dr. Sweeny during that year, but with each of those payments a letter was sent stating that a full settlement could not be arrived at until after the expiration of the current medical year when the accounts had been fully made out and the amount available for the panel fund had been ascertained. In February, 1914, the garnishees received a large sum from the Insurance Commissioners, but that sum was not allocated to any particular purpose; it was required for all the purposes of the garnishees' administrative work, and it did not appear that any part of that sum was allocated to the several funds for the year 1913. It appeared, however, from the quarterly accounts sent in by Dr. Sweeny in 1913 that if the panel fund when ascertained was sufficient to meet all similar accounts from the other panel doctors in Manchester there would be due to Dr. Sweeny a sum of about 298*l.* for that year, but as the accounts had not been made up it could not be ascertained whether he would in fact be entitled to receive that sum or indeed any part of it. The secretary to the garnishees said in evidence that he did not anticipate that there would be any additional sum available in respect of 1913 beyond what had already been paid, and that any balance in their hands in respect of that year had not been allocated for medical remuneration. Out of the money received by the garnishees in February, 1914, certain payments on account were made to the various panel doctors in Manchester other than Dr. Sweeny on April 30, 1914, in respect of the first quarter of 1914, and a similar payment would have been made to Dr. Sweeny on that date, amounting to 28*l.*, but for the service of the garnishee order nisi.

Campbell, K.C., and *Trickett* (*T. Scanlan* with them), for the plaintiffs. Under Order XLV., r. 1 (which substantially reproduces s. 61 of the Common Law Procedure Act, 1854), an order may be made not only attaching an accruing debt in the hands of the garnishee, but also an order for payment of the accruing debt when it shall become payable by the garnishee to the judgment creditor: *Tapp* v. *Jones*. (1) In *Nash* v. *Pease* (2) it was held that an annuity payable to the judgment debtor under her husband's will for the maintenance of herself and her infant son was attachable in the hands of the trustees in whom it was vested, subject to an inquiry as to the proportion to be allowed for the maintenance of the son. In *Edmunds* v. *Edmunds* (3) the fees payable to a person holding the offices of public vaccinator and registrar of births and deaths were held attachable. Those cases clearly show that the sums which will be payable to Dr. Sweeny, although the amount may not yet be ascertained, can be attached.

Panel doctors being paid by fees for the work done by them, there is no analogy between their position and that of naval or military officers, whose salaries have been held not to be attachable. It cannot therefore be successfully contended that there is any reason of public policy to prevent the attachment of the amount payable to Dr. Sweeny.

R. A. Wright, for the garnishees. There is no attachable debt in this case. No specific sum is due to Dr. Sweeny; there is no personal liability on the garnishees; and payment is contingent on the receipt of money by the garnishees from the Insurance Commissioners. There may be a debt due to Dr. Sweeny when the exact sum to be paid to each individual doctor is ascertained; but, on the other hand, there may be nothing due to him. At the date of the garnishee order nisi there was no ascertained or liquidated sum due. To be attachable there must be "a debt perfected": per Wightman J. in *Jones* v. *Thompson*. (4) Thus, a claim under a fire policy has been held not to be attachable: *Randall* v. *Lithgow* (5); the same has been

(1) (1875) L. R. 10 Q. B. 591.
(2) (1878) 47 L. J. (Q.B.) 766.
(3) [1904] P. 362.
(4) (1858) 27 L. J. (Q.B.) 234.
(5) (1894) 12 Q. B. D. 525.

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held with regard to rent before it is payable, notwithstanding the provisions of the Apportionment Act, 1870: *Barnett* v. *Eastman* (1); and in the same way it has been decided that the salary of a medical or other officer cannot be attached before it is actually payable because it is not a debt due or accruing due: *Hall* v. *Pritchett*. (2) The income of a fund vested in trustees is only attachable if at the date of the garnishee order the trustees have the income in their hands: *Webb* v. *Stenton*. (3) In this case any funds in the garnishees' hands are trust funds and, altogether apart from the question of public policy, cannot be attached until the funds are specifically appropriated to the individual doctors. As to the case of *Edmunds* v. *Edmunds* (4), cited on behalf of the plaintiffs, it is sufficient to say that the amount of the fees there was ascertained and was a debt accruing due notwithstanding that certain ministerial acts had to be performed before the officer was entitled to payment.

On the other point: the general principle is that where money is payable out of public funds in order that a person may be able to discharge public duties that money cannot be assigned or attached, because it would be against public policy to permit this. The full pay of a military officer cannot be assigned: *Barwick* v. *Reade* (5); the same has been held with regard to the pay of a surgeon in the navy: *Apthorpe* v. *Apthorpe* (6); see also *In re Mirams*. (7)

[ROWLATT J. It does not seem to me that this case comes within the principle of those you have cited. The amount payable to Dr. Sweeny is not salary at all; he is to be paid fees according to the work done.]

The position of a panel doctor is analogous to that of a surgeon in the navy. Having in view the scope of the National Insurance Acts, which necessitate the employment of doctors, each doctor comes within the category of civil servants.

Campbell, K.C., in reply. On the main point: a debt is ascertained although it may be subject to the furnishing and vouching of accounts: *Edmunds* v. *Edmunds*. (4) *Webb* v.

(1) (1898) 67 L. J. (Q.B.) 517.
(2) (1877) 3 Q. B. D. 215.
(3) (1883) 11 Q. B. D. 518.
(4) [1904] P. 362.
(5) (1791) 1 H. Bl. 626.
(6) (1887) 12 P. D. 192.
(7) [1891] 1 Q. B. 594.

Stenton (1) is in the plaintiffs' favour; in that case Brett M.R. said that a debt in existence but payable in futuro is attachable. In any view the defendants have no answer as to the sum they have in hand in respect of the first quarter of 1914 which was not paid to Dr. Sweeny.

ROWLATT J. I have to decide whether there is a debt due or accruing from the Manchester Insurance Committee to Dr. Sweeny, the debtor, and if so, whether there is any principle of public policy preventing the debt being attached.

Dealing first with the question of public policy, one is familiar with the principle that forbids the alienation, whether voluntarily or by attachment, of the salary of a naval or military officer and possibly other officers, it being in the interests of the Crown that those persons should perform the services for the rendering of which in the present or in the future the salary or half-pay is given them. But this case, when the facts are looked at, does not seem to me to bear any resemblance to those cases. The insurance fund is collected from a body of persons to be insured, with some little addition from the State, and these local bodies are set up who have to engage doctors to do the work, and those doctors are paid simply as practitioners for doing the work. They are paid in a particular way; that is all that it comes to. The doctors of the locality are retained to attend to people insured out of the moneys really provided by the general body of the people insured. Such a case does not fall within the principle of those cases as to public policy to which I have alluded. No case has been cited which covers it, and it certainly does not strike me as being a case to which the principle contended for by the garnishees ought to be applied.

The other point, which is a very nice one and very near the line, is whether there is any sum due or accruing due as a debt, within the meaning of Order XLV., r. 1, and the cases, from the Manchester Insurance Committee to Dr. Sweeny. The insurance committee is by statute a corporation with power to sue and be sued. It has the obligation laid upon it by statutory rules to make agreements with doctors for the rendering of services by them.

(1) 11 Q. B. D. 518.

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The insurance committee can agree with the doctors either to pay them so much per head of the insured population or so much per attendance, but that is really only nominal, because the fund out of which the doctors are to be paid is a peculiar fund. The insurance committee as a corporation have no funds of their own in respect of which they can contract or incur a debt; insurance contributions are collected throughout the country from the people who are employed and insured, and find their way to the Insurance Commissioners, who distribute them among the local insurance committees according to a proportionate system of some kind which I need not inquire into, and then it becomes the duty of the local insurance committees (and it is only in respect of such funds that they can contract) to distribute them to the doctors according to the agreements made with them. If there is not enough the doctors' charges are reduced; if there is exactly the right amount the doctors' charges stand where they were, which I suppose never happens; if there is too much there is what is practically a bonus distributed among the doctors all round. Mr. Campbell, for the plaintiffs, has urged upon me that when the doctors take their agreements to be paid so much for such and such an attendance and so on, as they undoubtedly do, the insurance committee contract to pay them those sums subject to a discount if there is not sufficient money; but on the other hand they also contract to pay them more if there is an amount in excess. In my judgment the naming of the amount of the charges of the doctors for specific attendances, for specific treatment and so on, is really only machinery for ascertaining the amount pro forma credited to the doctors upon which is to be calculated the proportion which each gets of the whole fund as against his fellow practitioners in the same town, and, for all I know, as between town and town. In substance the agreement of the insurance committee is to pool the amount received by them from the Commissioners and to distribute the same pro rata among the doctors having regard to the nature of the work done by them, and giving each doctor a greater or smaller share of the fund according to the class of work, as shown by the various items in the schedule, which he has performed. In those circumstances it seems to me that when the insurance committee have

received money for the purpose from the Commissioners there is a debt due or accruing due to every doctor who has done the work. I do not think that there can be any debt on the part of the insurance committee before they have got the money although they are perfectly sure to get it. In point of law I do not see how, when the insurance committee's agreement is, as I think it is, to pay out of the money received from the Insurance Commissioners, there can be said to be any debt due from them before they get that money; but when they get that money it seems to me that there is a debt due to the doctors although the exact share payable to each doctor may not, as a matter of calculation and only as a matter of calculation, yet be ascertained. The doctor has done the work; the money has been handed to the local insurance committee, and I infer—I suppose it is a question of fact—that too much had not been handed to them so that there is anything to go back to the Insurance Commissioners. That being so, it is a mere question of calculating and putting down upon paper that which in fact is already ascertained in the sense that it cannot be altered. It is not ascertained in the sense that it is worked out, but all the facts are there, and it is a mere question of working out exactly how the fund is to be divided. But when they have the fund it seems to me there is a debt due to the doctors in the proportions that shall emerge when the figures and facts are fully gone into. That seems to me to be the legal position.

In this case the question arises as to the position on April 9, 1914. Dr. Sweeny had been working since the beginning of 1913, and in respect of 1913 he had been credited with, roughly, 500*l.*; that is to say, that is the amount which his allowed charges had come to. He had been paid 250*l.*, and there was about 250*l.* more which he was looking to get if there were sufficient funds. I am told that there may be a little more money in the hands of the committee, something trifling, in respect of 1913, and I think I must assume that that is so. I cannot and do not believe that the Insurance Commissioners would hand over to the committee more than was certain to be due to them. They handed over something that was within the mark, I am sure, and it is quite impossible to believe that

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in distributing their provisional percentages to the doctors concerned the committee actually used up the last penny of the fund. I think, therefore, that in respect of 1913 I must come to the conclusion that there is a debt accruing due to Dr. Sweeny and a debt which is certain to the extent of his share of the money in respect of 1913 which they have in their hands, although it is quite impossible for me—and nobody has in fact at present done the sum—to say how much in pounds, shillings, and pence there is. All the elements for ascertaining that sum are there, and on the principle certum est quod certum reddi potest I think there is a certain sum due and owing from this committee to Dr. Sweeny in respect of 1913. As to 1914 the case is a little different. We have not yet come to the end of 1914, but Dr. Sweeny did work for three months before April 9, and the insurance committee received in February a large sum—29,000*l.*—in a lump sum in respect of all their duties under the Act. A large proportion of that sum, I take it, must be on account of medical benefit, and Dr. Sweeny had an absolute right to some share of that money. How much I cannot say in figures, but the amount depends upon absolutely certain facts—facts which are certain and ascertained now as I understand; and therefore I think there is also a debt due and owing in respect of the first quarter of 1914. The plaintiffs must, I suppose, proceed again at the end of this year, or from time to time, unless, as I hope may be the case, the committee see their way to let the plaintiffs be paid out of the money which from time to time becomes due to Dr. Sweeny. The plaintiffs are now entitled to an order attaching all debts due or accruing due to Dr. Sweeny up to April 9, 1914, in respect of the services rendered by him under the National Insurance Act.

Judgment for plaintiffs.

Solicitor for plaintiffs: *Herbert Z. Deane.*

Solicitors for garnishees: *Withers, Bensons, Birkett & Davies.*

J. S. H.

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Jan. 22.

Landlord and Tenant—Licensed Premises — Lease made before Finance (1909-10) *Act*, 1910—*Increased Licence Duty—Liability of Lessor to pay Proportion of Increase—"Premium" payable by Lessee—Cost of rebuilding Premises by Lessee pursuant to Agreement for Lease—Surrender Value of Prior Unexpired Lease—Finance Act*, 1912 (2 & 3 *Geo.* 5, c. 8), *s.* 2.

Where, in pursuance of an agreement for a lease of licensed premises, the lessee has expended a large sum in rebuilding the premises and has surrendered an unexpired lease of the premises, and the lessor has then granted the lease, neither the sum so expended nor the surrender value of the prior lease is a "premium" payable by the lessee, within s. 2 of the Finance Act, 1912, to be taken into account in determining what proportion, if any, of the increased licence duty can be recovered by the lessee from the lessor under s. 2.

APPEAL from the Brompton County Court.

Action to determine what proportion (if any) of the increased licence duty of a public-house the plaintiff was entitled to recover from the defendant, his landlord, under s. 2 of the Finance Act, 1912.

The plaintiff was the lessee and licensed occupier of the "King's Arms" public-house under a lease dated October 16, 1900, of which the defendant was the grantor, for the term of ninety years from March 25, 1897, at the yearly rent of 300*l.* That lease was granted in pursuance of an agreement made in August, 1898, between the defendant and one Lillies, who was then the holder, as assignee thereof, of a lease of the public-house for a term of sixty years from November 14, 1853, at the yearly rent of 66*l.* 10*s.* In 1898 the lease of 1853, and the agreement and the benefit thereof, became vested in the plaintiff by assignment.

By the agreement it was provided (inter alia) that Lillies should at his own expense remove the buildings known as the "King's Arms" public-house and should in lieu thereof at his own expense build a new public-house on the site so cleared, expending in erecting such public-house a sum of not less than 4000*l.* It further provided that Lillies should surrender to the defendant at his own expense the lease of 1853; and that, subject to the provisions thereof, as soon as A. C. Lillies should have erected the public-house in accordance with the terms of the agreement

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the defendant would grant to him a lease in the form of which a copy was set out in the schedule to the agreement.

The plaintiff having so rebuilt the public-house, and surrendered the lease of 1853, the defendant duly granted to him the lease of 1900, which was expressed to be so granted in consideration (inter alia) of the expense incurred by him in rebuilding the premises.

The plaintiff contended that the sum which he had expended in rebuilding, and the surrender value of the lease of 1853, were each a "premium" within the meaning of the Finance Act, 1912, s. 2. (1)

The duty payable in respect of the licence of the premises prior to the Finance (1909-10) Act, 1910, was 60*l.*; the duty is now 176*l.* 10*s.*, the increase of the duty being 116*l.* 10*s.* Since August 7, 1912, the plaintiff neither deducted nor recovered any sum from the defendant in respect of the increased duty, nor was the proportion agreed between them. The plaintiff claimed a determination by the Court of how much of the increase of duty he was entitled to recover as a debt due from the defendant to him, or to deduct from any sum due from him to the defendant, and claimed to recover or deduct in respect of the said increase the duty paid by him.

The county court judge found that the plaintiff, in complying

(1) Finance Act, 1912 (2 & 3 Geo. 5, c. 8), s. 2: "Where the licensed premises are held under a lease or agreement for lease made before the passing of the Finance (1909-10) Act, 1910, which does not contain or import any covenant, agreement, or undertaking on the part of the lessee under such lease or agreement for lease to obtain a supply of intoxicating liquor from the grantor of the lease or agreement for lease, the lessee under such lease or agreement for lease shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from, or deduct from any sum due to, the grantor of such lease or agreement for lease so much of any increase of the duty payable in respect of the licence under the provisions of the Finance (1909-10) Act, 1910, as may be agreed upon as proportionate to any increased rent or premium payable in respect of the premises being let as licensed premises, and, in default of agreement, the amount proportionate to such increased rent or premium shall be determined in manner directed by rules of court by a county court in England or Ireland and by a sheriff court in Scotland.

"The words 'lease,' 'leased,' 'agreement for lease,' and 'lessee' in this section include sub-lease, sub-leased, agreement for sub-lease, and sub-lessee, respectively."

with the terms of the agreement, had expended 5000*l.* upon the premises, and that the surrender value of the lease of 1853 was the sum of 2530*l.*; and he held that each sum was a "premium" within the meaning of s. 2. He accordingly decided that the defendant was bound to pay a proportionate part of the increased licence duty amounting to 65*l.* a year.

The defendant appealed.

W. C. Ryde, K.C., and *G. Cecil Whiteley*, for the appellant. The sole question on this appeal is as to the meaning of the expression "premium payable in respect of the premises" in s. 2 of the Finance Act, 1912. "Premium" there can only mean a money payment made by the lessee to the lessor. Money expended upon the premises by the lessee at or before the commencement of a long lease may be worth nothing, or very little, to the lessor at the end of the term; the tenant will get all, or nearly all, the benefit. Therefore the ultimate value of such expenditure to the landlord, calculated at the commencement of the term, will be practically nothing; and the scheme of s. 2 is to ascertain what the landlord got at the beginning of the term in addition to the subsequent annual rent. The term "premium" is there used in collocation with the words "lease" and "rent," which shows that "premium" must refer to a payment made to the lessor. The county court judge relied upon the judgments in *Camden* v. *Inland Revenue Commissioners* (1) in the Court of Appeal; but that case has no bearing upon the present case. It was decided under s. 13 of the Finance (1909-10) Act, 1910, sub-s. 1 of which provides that reversion duty shall be charged on "the value of the benefit accruing to the lessor" by reason of the determination of a lease, and sub-s. 2 that the original value of the premises is to be ascertained "on the basis of the rent reserved and payments made in consideration of the lease"; and therefore on the wording of that section the Court of Appeal held that "payments made in consideration of the lease" included the sum expended by the lessee in such a case as this. That decision was upon an entirely different section, differently worded, and enacted for quite a different purpose.

(1) [1914] 1 K. B. 641.

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A fortiori the surrender value of the prior unexpired lease cannot be said to be anything "payable in respect of the premises," and therefore cannot be a "premium" within s. 2. Further, in reality the money value of a lease surrendered by a tenant who obtains a new lease remains with him, and no part of that value goes to the landlord.

A. F. W. Wootten, for the respondent. The provisions of s. 2 are intended to readjust the position as between lessor and lessee after the increased burden imposed upon the tenant by the increase of the licence duty, and to make it as nearly as possible the same as it would probably have been if the higher duty had obtained at the date of the lease. If, in a case like this, the higher duty had been payable at the date of the agreement for a lease, the lessee would probably have spent less or paid a lower rent. The argument that "premium" here means only money paid to the lessor and put into his pocket is illogical. The money is just as much spent by the tenant in order to obtain the lease at the agreed rent in the case where he spends it upon the premises as in the case where he pays it to the lessor. The statute must have been intended to apply to a case like this where there was a contract to expend a definite sum of money upon the premises before the granting of the lease. That is clearly part of the price of the lease and is therefore a "premium" within the ordinary meaning of the word. It is precisely the same if a sum of money is paid to a landlord, or his builder, to expend upon the premises, or to a landlord to put into his pocket: *Camden* v. *Inland Revenue Commissioners* (1), per Swinfen Eady L.J. The decision in *Procter* v. *Tarry* (2) shows that the landlord does obtain the whole benefit of the expenditure on rebuilding the premises; and, if so, it is manifestly inconsistent and unjust to exclude that expenditure from consideration as a "premium" under s. 2. The term "premium" can certainly include this expenditure: Wharton's Law Lexicon, 4th ed., p. 750; for it has a wide meaning: *Lion Insurance Association* v. *Tucker*. (3) As in s. 13 of the Act of 1910, which was considered in *Camden* v. *Inland Revenue*

(1) [1914] 1 K. B. 641, 655. (2) [1914] 2 K. B. 178.
(3) (1883) 12 Q. B. D. 176, 187.

Commissioners (1), so in s. 2 of the Act of 1912, the words are not "premium payable to the landlord," but simply "premium payable"; and the judgment of Phillimore L.J. in that case shows that an expenditure of this kind is a "premium."

Ryde, K.C., was not called on to reply.

RIDLEY J. In this case we have arrived at a conclusion contrary to that which was arrived at by the learned county court judge.

The matter arises under s. 2 of the Finance Act, 1912, which deals with the proportion in which the burden of the new increased licence duty is to be borne as between the landlord and the tenant, and provides how that proportion is to be ascertained. [His Lordship then read the section.] Now, in this particular case, there were two items which were the subject of dispute and of the decision. The first item was the cost of rebuilding, in consideration of which the lease was granted; and the second was the surrender of the pre-existing lease. The tenant had agreed to surrender his lease before its expiration and to take a new lease at an increased rent of 300*l.* a year, instead of 66*l.* 10*s.*, for an increased term of years; and he also agreed to expend money in pulling down and rebuilding the premises which were the subject of the lease. The question before us is whether the cost of rebuilding the premises, and the surrender value of the old lease, were either of them "a premium payable in respect of the premises" within the meaning of s. 2. The learned county court judge came to the conclusion that they both were, and that therefore there was a sum recoverable, which he assessed at 65*l.* a year.

With regard to the first item, the amount expended by the plaintiff in pulling down and rebuilding the premises in pursuance of the agreement, the county court judge said that he was following the judgment of Cozens-Hardy M.R. in *Camden* v. *Inland Revenue Commissioners* (2), where he said: "Suppose there are two plots of land of equal value: The landlord says to A., if you will spend 1000*l.* in building a house on the first plot, I will grant you a lease of it for ninety-nine years at a rent of 10*l.*

(1) [1914] 1 K. B. 641. (2) [1914] 1 K. B. 641, 653.

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Ridley J.

The landlord says to B., if you will pay me 1000*l.*, I will build a house on the second plot, and will grant you a lease of it for ninety-nine years at a rent of 10*l.* Is there any real difference between these two cases? In my opinion there is not." I do not think it is possible to question that reasoning of the Master of the Rolls, but it is not applicable to the statute which we are now discussing. That reasoning was used with reference to s. 13 of the Finance Act of 1910, which deals with a different subject-matter. Under sub-s. 2 of s. 13 of that Act the object is to arrive at the total value of land at a former date and also at the subsequent date when reversion duty may be payable, and it provides accordingly that the value of the benefit accruing to the lessor on the reversion falling in shall be deemed to be the amount (if any) by which the total value at the time the lease determines exceeds the total value at the time of the original grant of the lease, "to be ascertained on the basis of the rent reserved and payments made in consideration of the lease." Under that enactment, in order to find the value of the demised land, you must consider what has been spent upon it, and therefore must take into consideration all payments made in consideration of the lease. It seems to be clear from the judgments in that case that that was the main question which was there decided. Here, however, the question is not what was and is the total value of the land, but what was the "increased rent or premium payable in respect of the premises being let as licensed premises," which is not the same question. The latter question is what did the landlord receive as an increased rent or premium in respect of the premises being let as licensed premises, which he would not otherwise receive? It seems to me impossible to say that, because the money is a payment made in consideration of the lease within the words of s. 13 of the Act of 1910, therefore it is also a "premium payable" to the landlord. A "premium" means a consideration passing in lieu of rent from the tenant to the landlord, generally speaking upon the granting of a lease. In a sense, it is capitalized rent, something that is payable, not as an annual rent, but as a payment down to take the place of part of what otherwise would be calculated and paid as an annual rent. If that is so, and I cannot attach any other

meaning to the word in this connection, I think it is impossible to say that the money which the tenant agreed to expend in pulling down and restoring and improving these premises is a premium. The landlord did not receive it. He got, indeed, something, that is, an improved property, a property which, at the end of ninety years, will, so far as we can foresee, be of better value, and which is at the present moment of better value. But the tenant also is getting the benefit of that; he has better premises instead of the old premises. That seems to me to be a totally different thing from a premium. It may be that the landlord will receive nothing at all from such expenditure; that may depend upon the length of the term. For these reasons it seems to me to be a fallacy to say that the decision in *Camden* v. *Inland Revenue Commissioners* (1) governs this case.

The other point which was decided in favour of the plaintiff was as to the surrender value of the lease. I think that the same reasoning which I have used with regard to the point already dealt with will govern this point. I think both points fall together, and, for the reasons I have given, I think that this decision was not correct and that neither of these considerations can be counted as a "premium." Judgment, therefore, must be for the defendants.

BRAY J. I am of the same opinion. We have to construe the words of s. 2 of the Finance Act, 1912. The object of that section is to make the landlord pay a contribution to the tenant because there had been imposed upon the tenant an additional duty depending upon the value of the licensed premises. The amount of that payment is specified in the section—it is to be "so much of any increase of the duty payable in respect of the licence under the provisions of the Finance (1909-10) Act, 1910, as may be agreed upon as proportionate to any increased rent or premium payable in respect of the premises being let as licensed premises." That, of course, is quite an artificial sum, and we have to try and arrive at the true construction of a very difficult part of that section.

The contention of the respondent is that, when there is a

(1) [1914] 1 K. B. 641.

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covenant by the lessee with the lessor that he, the lessee, will expend a certain sum, or, if you like, an uncertain sum, in building, that is a "premium" within the meaning of those words. We have, therefore, to construe the word "premium" in connection with "lease." The word "premium" in connection with the word "lease" has a perfectly well known meaning. It means some additional payment made by the lessee to the lessor beyond the rent of the premises. A covenant by the lessee to expend a certain sum on building is a very ordinary covenant in a lease, and particularly in a long lease. Has that ever been called a premium? I have never heard it so called and I have never seen it so described. It therefore seems to me that to give that meaning to the word "premium" here is to give a non-natural meaning to the word. There are no doubt times when it is necessary to give a meaning to a word other than the most natural meaning. It may be because the context so requires, or it may be because to give any other meaning would be to reduce the enactment to an absurdity and make it quite contrary to what was the intention of the Legislature. It is contended here that, if we do not give this meaning to the word "premium," we shall not be carrying out the intention of the Act. But one has to see what is the effect of giving that meaning. The effect of giving that meaning would be that the landlord would have to pay exactly the same proportionate part of his rent, whether he has received 5000*l.* into his pocket or only has whatever benefit there may be to him when the tenant has expended 5000*l.* upon the property which he, the tenant, is to retain for ninety years. The value to the landlord of this covenant is only a minute proportion of 5000*l.* He gets the benefit, undoubtedly, of an increased security during the lease, and at the end of the ninety years he will get a property which may be increased in value. The two things are absolutely different. In one case the landlord would at once get 5000*l.* into his pocket; in the other it would probably be an exaggeration to say he would get 100*l.* To my mind, to suppose that the Act intended that is really absurd. There is no reason, therefore, it seems to me, why we should not here give the natural meaning to the words "premium payable," used as they are in dealing

with a lease and coupled with the words "any increased rent."

The learned county court judge has relied mainly in support of his judgment upon some observations of Cozens-Hardy M.R. in *Camden* v. *Inland Revenue Commissioners*. (1) The Court there had to construe entirely different words relating to an entirely different subject-matter. They were dealing with reversion duty and with a question of total value, and the words there were "to be ascertained on the basis of the rent reserved and payments made in consideration of the lease." No doubt there are many payments made in consideration of a lease which are not premiums; but, when amending that very Act of 1910 by this Act of 1912, the Legislature has deliberately used the word "premium" and "premium" alone. It seems to me that to give a particular meaning to the word "premium" in s. 2 because that meaning has been given to different words in the earlier Act, i.e., "payments made in consideration of the lease," would be quite absurd. In my opinion that case has really no bearing upon this case.

The other question is as to the value of the surrender of the lease. As Mr. Wootten admits, that involves the same point, and the reasoning is exactly the same. It is an attempt to construe the word "premium" in a non-natural sense. I think on both points the learned county court judge was wrong, and that the appeal must be allowed.

Appeal allowed.

Solicitors for appellant: *Lee & Pembertons.*

Solicitors for respondent: *Crossman, Prichard & Co.*

(1) [1914] 1 K. B. 641, 653.

J. H. W.

1915
Feb. 5.

MAY *v.* BORUP AND ANOTHER.

Landlord and Tenant—Determination of Tenancy — Validity of Notice—Claim to cancel Notice in a Certain Event.

An agreement for a yearly tenancy provided that the tenancy might be determined by six months' notice to be given on March 1 and September 1 in any year. On December 23, 1913, the tenants wrote to the landlord giving notice to quit the premises "at the earliest possible moment," and stating that if, as the tenants hoped, a satisfactory reorganization of their business was effected, the notice would be "cancelled":—

Held, that the fact that the tenants claimed by the notice to exercise in a certain event a right which they did not possess, namely, to cancel the notice, did not render the notice bad as being conditional, and that the letter constituted a valid notice determining the tenancy at the expiration of six months from March 1, 1914.

APPEAL from Wandsworth County Court.

The defendants were the tenants of the plaintiff of a studio under an agreement for a yearly tenancy which provided that the tenancy might be determined by six months' notice on either side to be given on March 1 or September 1 in any year.

The action was brought to recover rent for the month of September, 1914. The defence was that the tenancy had been determined on August 31, 1914, by notice.

The notice relied on was contained in the following letter written and sent by the defendants to the plaintiff on December 23, 1913: "We very much regret having to give you notice to quit the studio at Deerhurst at the earliest possible moment. We are hoping to effect a satisfactory reorganization of our film enterprise shortly after Christmas, in which case the notice will be cancelled; but should our expectations not be realised we naturally wish to relieve ourselves of the studio at the earliest possible moment, unless in the meantime we see some other use for it."

The county court judge held that this letter was not a good notice in that the defendants reserved to themselves the right in a certain event to continue their tenancy. He therefore gave judgment for the plaintiff.

The defendants appealed.

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J. B. Melville, for the defendants. Although the agreement provided for notice to be given on March 1, it was conceded in the Court below that a notice was not bad if given on some other previous day. The county court judge held that the notice was invalid because it was optional. An optional notice is not necessarily bad: *Ahearn* v. *Bellman* (1); *Bury* v. *Thompson* (2); but this notice was not optional. The first paragraph is a clear and certain notice to determine the tenancy at the earliest possible moment, that would be at six months from March 1. The latter part of the letter should be treated as surplusage, for the defendants were claiming to exercise a right which they did not possess, namely, to cancel the notice. [He referred to Woodfall's Landlord and Tenant, 19th ed., p. 411.]

Drysdale Woodcock, for the plaintiff. A notice to quit must be plain and unequivocal in its terms. This notice is too vague, for it imposes on the landlord the obligation to ascertain what in law was the earliest possible moment at which the tenancy could be determined: *Davies* v. *Davies*. (3) The notice is also invalid because it is optional, that is to say, it contains an intimation that in one event the tenancy will be determined and in another that it will be continued. *Ahearn* v. *Bellman* (1) is distinguishable, for there the first part of the notice was in clear and direct terms; the latter part was an offer of a new tenancy on different terms. This notice assumes that in a certain event the existing tenancy will continue. [He referred to Foa's Law of Landlord and Tenant, 5th ed., pp. 601, 602.]

A. T. LAWRENCE J. The question in this case is whether the defendants' letter of December 23, 1913, was a good notice to determine the tenancy on August 31, 1914. By the terms of the agreement notice was required to be given on March 1 and September 1 in any year, but it is clear that a notice given before either of those dates would be a good notice, if it were otherwise regular. The grounds on which it is contended that this was not a good notice are twofold. First, it is said that it

(1) (1879) 4 Ex. D. 201. (2) [1895] 1 Q. B. 696.
(3) (1887) 36 Ch. D. 359.

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A. T. Lawrence J.

is too vague, because the notice is to quit "at the earliest possible moment." No doubt a notice to quit must be clear and certain, but I do not think that there is anything vague or uncertain about this notice. The earliest possible moment at which the tenancy could determine could only be six months after the date on which notice had to be given. As this notice was given on December 23 and the agreement required six months' notice from March 1, the earliest possible moment for the determination of the tenancy could be no other date than August 31.

Secondly, it is said that the notice is not certain or positive but optional or conditional by reason of the statement that if the defendants effected a satisfactory reorganization of their business the notice would be cancelled. I agree that if that statement were intended to be a reservation on the previous part of the letter there would be some force in the argument; but I do not think that it is a condition or reservation. It is a mere statement of the defendants' hopes and expectations, and when they say that they will in certain events cancel the notice they are assuming they have a right which they have not and which they could not enforce. A tenant who has given a good notice to quit cannot subsequently cancel it without the consent of the landlord. If the tenant desires to continue his tenancy after giving notice it is a matter for negotiation with the landlord, who can accept or reject the tenant's proposals as he pleases. I agree that if a notice to quit is given subject to a condition it would not be a good notice, but I am clearly of opinion that this was not a conditional notice. The appeal must therefore be allowed.

SANKEY J. I agree. A notice to quit must be clear and unambiguous. This notice consists of two paragraphs, the first of which is in my opinion a clear and unambiguous notice to quit at the earliest possible moment, that was, in the circumstances, August 31. Then is the first paragraph vitiated by the terms of the latter part of the letter? I do not think that the defendants' expressions of hope and of their intention to exercise a right which they had not got do vitiate the clear notice contained

in the earlier part of the letter, for, as Lawrence J. has pointed out, the latter sentence is neither a condition nor a reservation.

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Appeal allowed.

Solicitor for plaintiff: *Charles May.*

Solicitors for defendants: *Witherfield, Son & Barnes.*

F. O. R.

AUSTIN FRIARS STEAMSHIP COMPANY, LIMITED *v.* SPILLERS & BAKERS, LIMITED.

1914

Dec. 18, 21.

[1914 A. 724.]

Shipping—General Average—Damage to Property—Tortfeasors—Contribution—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 66.

Liability for damage to property, where the damage is directly consequential on a general average act, may be the subject of a general average contribution, even assuming that the owners of ship and cargo were joint tortfeasors in relation to the damage.

TRIAL of action before Bailhache J. without a jury.

The following statement of the facts is taken from the judgment of the learned judge.

The plaintiffs, the owners of the steamship *Winchester*, claimed from the defendants, the owners of the cargo, contribution in general average in respect of two items of alleged general average sacrifice and expenditure. The defendants denied their liability upon the ground that the items in question were neither general average sacrifice nor expenditure.

The steamship *Winchester* was on November 6, 1912, bound for Sharpness Docks with a cargo of maize. As she was proceeding up the Severn, a little way short of the docks she grounded. She floated next morning on the flood tide and was carried by the tide further up the Severn to a point about a mile above the entrance to the docks, where she was stranded. She became very seriously damaged, and both ship and cargo were in imminent danger. On the morning of November 7 she was got off on the ebb tide with the assistance of tugs. She had no steam of her own, and only her hand-steering gear was available. She had a pilot on board, and the intention at first was to take

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her down the river to a place called Ackthorn, and there put her on the ground for the greater safety of ship and cargo. After she had been towed about half a mile, the carpenter reported that she was making water, and the master and pilot thereupon consulted and decided to take her into dock. To get there she had to be taken between two piers. The ebb tide was running strongly, as it does in the Severn, and both master and pilot contemplated her striking the lower pier and doing damage. The pilot in fact intended that she should touch the lower pier, as he said, to take the reach off her, and he remarked that it was not the time to trouble about another thousand pounds worth of damage. The master and pilot both considered that as between going to Ackthorn and hitting the pier the latter was the lesser of two evils, and took action accordingly. As was anticipated, she struck the pier with her starboard bow, and struck it twice in fact. She struck harder than the pilot intended and damaged herself to the extent of about 1600*l.*, and the pier to the extent of about 5000*l.* These are the two items in question. To put into Sharpness with the knowledge that in doing so the steamship would strike the pier was a reasonable and prudent thing to do in the interests of ship and cargo.

Roche, K.C., and *MacKinnon, K.C.*, for the plaintiffs. The entering of the dock was a general average act. A loss caused by or directly consequential on such an act is the subject of general average contribution: Marine Insurance Act, 1906, s. 66. It cannot matter that the loss is incurred through injury to the property of a third person. The definition of general average in the leading text-books would include such a loss: Phillips on Insurance, 5th ed., vol. ii., p. 83, sub-s. 1311; Arnould on Marine Insurance, 2nd ed., vol. ii., p. 912, s. 331; Lowndes on General Average, 5th ed., pp. 136, 173.

Leslie Scott, K.C., and *Raeburn*, for the defendants. The practice of average adjusters has become fixed. There is no precedent for allowing contribution when the loss has been caused through injuring the property of others; still less where it consists of a liability to others for an injury to their property. The injury to the dock was a tort: *Whalley* v. *Lancashire and*

Yorkshire Ry. Co. (1) Between tortfeasors there is no right to contribution at common law: *Merryweather* v. *Nixan.* (2)

Cur. adv. vult.

Dec. 21. BAILHACHE J. delivered a written judgment which after stating the facts proceeded as follows:—

The operation of getting the *Winchester* off and taking her either to Ackthorn or into Sharpness was, under the circumstances, a general average act, and a general average loss is defined in the Marine Insurance Act, 1906, s. 66, as being "a loss caused by, or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice." Lawrence J. in *Birkley* v. *Presgrave* (3) defines general average loss in terms which have become classical. He says: "All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo come within general average, and must be borne proportionably by all who are interested." The statutory definition must now prevail, and I only quote the well-known definition from the judgment of Lawrence J. because I want to refer to a passage in Mr. Lowndes' work on general average which is extremely pertinent to the question I have to decide. It was written, of course, before the Act of 1906, and if I am to rely upon it, it is necessary to see that the law was the same then as now. Mr. Lowndes in his book on general average, 4th ed., p. 36, says, in respect of what constitutes a general average loss, "We have to determine quod pro omnibus datum est, and since giving must always imply an intention to give, what we have here to ascertain must be, what loss at once has in fact occurred, and likewise must be regarded as the natural and reasonable result of the act of sacrifice? Or, in other words, what the shipmaster would naturally, or might reasonably, have intended to give for all when he resolved upon the act." (4) Mr. Lowndes (5) cites a

(1) (1884) 13 Q. B. D. 131.
(2) (1799) 8 T. R. 186; 1 Sm. L. C., 11th ed., p. 398.
(3) (1801) 1 East, 220, at p. 228.
(4) In the 5th edition (1912), p. 40, the same passage occurs.
(5) 4th ed., App. E, p. 426.

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passage from Ulrich on general average which is worth repeating here. He says: "General average comprises not only the damage purposely done to ship and cargo, but also (1.) all damage or expense which was to be foreseen as the natural (immediate) consequence of the first sacrifice, since this unmistakably forms part of that which was given for the common safety; (2.) all damage or expense which, though not to be foreseen, stands to the sacrifice in the relation of effect to cause, or, in other words, was its necessary consequence. Not so, however, those losses or expenses which, though they would not have occurred but for the sacrifice, yet, likewise, would not have occurred but for some subsequent accident." Both these passages are quoted with approval by Bigham J. in *Anglo-Argentine Live Stock and Produce Agency* v. *Temperley Shipping Co.*(1) I cite them again because they seem admirable guides to me in the decision of this case.

Following these guides it is quite clear upon the facts stated by me that the damage to the steamship and to the pier both fall within the statutory definition of general average loss. This disposes of the right to contribution in respect of the damage to the steamship, and would dispose of the right to contribution in respect of the damage to the pier, but, strangely enough, there is no decision to be found upon the point whether general average expenditure includes the making good of damage done to the property of some third person. In principle, in such a case as this, it clearly does. If I ask Mr. Lowndes' question quid pro omnibus datum est? I answer, the damage to the steamship plus the liability to indemnify the dock authorities for the damage to their pier; and if I now turn to Ulrich, the collision with the pier was a foreseen result, and not the result of a subsequent accident. So far as text-writers are concerned, there is authority in favour of such expenditure being treated as a general average expenditure. Phillips on Insurance, 5th ed., vol. ii., par. 1311, says so, and refers to Casaregis for his authority; Sir Joseph Arnould in his work, the last edition edited by himself, the second edition, vol. ii., p 912, s. 331, is to the same effect.

(1) [1899] 2 Q. B. 403, at pp. 409, 410.

Mr. Leslie Scott urged that the law of general average has long since become crystallized, and that no further extension of it is possible, except, of course, by legislation. The answer is that it is not an extension of the law to apply old principles to new instances.

It was also suggested by Mr. Leslie Scott that as to run into the pier was as against the dock authorities a tort, and as there is by English common law no contribution between joint tortfeasors, there is no right to contribution in general average. This assumes that the dock company could have sued the cargo owner for the damage done by the ship to the pier, an interesting point which I should not be prepared to decide without argument and consideration. I do not, however, think that the common law rule applies in any sense in general average. In my judgment the position is this. The master has implied authority when occasion arises for a general average act to do whatever is necessary and prudent for the preservation of ship and cargo even if this involves committing a trespass, and there is the further implied obligation, on the part of the cargo owner and shipowner, to bear between them in their respective proportions the consequences of every such necessary or prudent act. This implied obligation may perhaps be said to be contractual as between shipowner and cargo owner, but I rather incline to the view expressed by Brett J. in *Burton* v. *English* (1), that it comes from the old Rhodian laws, and is incorporated into English law as the law of the ocean. It is scarcely necessary to say that maritime law as administered in this country, although part of the law of England, is not necessarily the same as our common law. The every-day instance of this is the difference in result in collision cases on land and on sea, where both parties are in fault.

My judgment, therefore, is for the plaintiffs in this case with costs.

Solicitors for plaintiffs: *Botterell & Roche.*

Solicitors for defendants: *Waltons & Co., for Batesons, Warr, & Wimshurst, Liverpool.*

(1) (1883) 12 Q. B. D. 218, at p. 220.

W. H. G.

C. A.
1915
Jan. 26.

[IN THE COURT OF APPEAL.]

THE KING *v.* HUDSON.

Insurance (National)—Unemployment Insurance—Insured Trade—Sawmilling carried on in connection with Insured Trade—Extension to "workmen in any trade other than an insured trade"—Special Order of Board of Trade—Extension to Workmen in Trade of Sawmilling not carried on in connection with Insured Trade—Appointment of "competent and impartial person" to report—Jurisdiction to decide whether Order ultra vires—Mandamus—National Insurance Act, 1911 (1 & 2 *Geo.* 5, *c.* 55), *ss.* 84, 103; *s.* 113, *sub-s.* 1; *Scheds. VI. and IX.*

By s. 84 of the National Insurance Act, 1911, which is in Part II. of the Act relating to unemployment insurance, a workman who, having been employed in a trade mentioned in the Sixth Schedule to the Act (called "an insured trade"), is unemployed, shall be entitled to unemployment benefit.

By clause 7 of the Sixth Schedule "sawmilling (including machine woodwork) carried on in connection with any other insured trade" is an insured trade.

By s. 103 power is given to the Board of Trade to make a special Order extending Part II. of the Act "to workmen in any trade other than an insured trade"; provided that no such Order shall be made if the person holding the inquiry in relation to the Order reports that the Order should not be made. By s. 113 and the Ninth Schedule notice of a draft Order must be given, and if any objection is made to the draft Order the Board of Trade shall direct an inquiry to be held, and may appoint a competent and impartial person to hold the inquiry and report to them.

The Board of Trade made a draft special Order extending Part II. of the Act to "workmen in the trade of sawmilling, including machine woodwork, whether carried on in connection with any other insured trade or not"; and upon objection being made appointed a competent and impartial person (called a Commissioner) to inquire and report thereon. The Commissioner was of opinion that the draft Order was ultra vires the Board of Trade upon the ground that sawmilling was already included by clause 7 of the Sixth Schedule in the list of insured trades, and that therefore the Order did not extend the provisions of Part II. of the Act to workmen "in any trade other than an insured trade" within the meaning of s. 103, and that he ought to report that upon that ground the Order should not be made:—

Held, that a mandamus must issue to the Commissioner to hear and determine the matter of the inquiry according to law upon the grounds (1.) that he had no jurisdiction to decide that the Order was ultra vires the Board of Trade, his only duty being to report whether it was desirable; (2.) that the Order upon its true construction only extended

Part II. of the Act to workmen in the trade of sawmilling not carried on in connection with any other insured trade, which was, within the meaning of s. 103 and the Sixth Schedule, a different trade from the sawmilling included as an insured trade in clause 7 of the schedule, and that therefore the Order was not ultra vires.

Decision of the Divisional Court, ante, p. 133, affirmed.

APPEAL from an order of the Divisional Court (reported ante, p. 133) making absolute a rule obtained at the instance of the Board of Trade calling upon Alfred Arthur Hudson, Esquire, K.C. (hereinafter called the Commissioner), to show cause why a writ of mandamus should not issue directed to him commanding him to hear and determine pursuant to the statutes in that behalf the matter of a certain inquiry with regard to a draft extension Order of the Board of Trade made under the provisions of s. 103 of the National Insurance Act, 1911, on the ground that he had not heard and determined the inquiry according to law. Notice of the rule was ordered to be given to the Bobbin Manufacturers' Association, one of the objectors to the Order.

The facts and the relevant sections and schedules of the Act are fully set out ante, p. 133, and are shortly stated in the head-note hereto.

The Commissioner, being of opinion that the question whether it was or was not within the power of the Board to make the Order was one which he was entitled to decide, and being further of opinion that he "ought to report to the Board of Trade under the proviso to s. 103 that this Order should not be made on the ground that it does not extend the provisions of Part II. of the Act to workmen in any trade other than an insured trade, sawmilling being already included in the list of insured trades for the purposes of Part II. of the Act by clause 7 of the Sixth Schedule thereof," thought it was useless to incur the expense of taking the evidence upon the facts, and therefore adjourned the inquiry sine die to enable the Board to apply to the High Court to correct his opinion if it should be wrong.

The Divisional Court (Lord Reading C.J., Lord Coleridge and Rowlatt JJ.) made the rule for a mandamus absolute upon the grounds (1.) that the Commissioner had no jurisdiction to decide whether the Order was ultra vires the Board of Trade, his only function being to ascertain whether it was desirable; (2.) that

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the Order was not ultra vires inasmuch as the trade of sawmilling it dealt with was, within the meaning of s. 103 and the Sixth Schedule, a different trade from the sawmilling included as an insured trade in clause 7 of the schedule.

The Bobbin Manufacturers' Association appealed.

L. Sanderson, K.C., and *T. Eastham*, for the appellants. The sawmilling trade is one trade, and the Legislature, having considered the question of making that trade as a whole an insured trade, determined to extend the provisions of Part II. of the National Insurance Act, 1911, to part only of it, namely, to sawmilling carried on in connection with any other insured trade. Inasmuch as the Legislature have specifically dealt with the trade of sawmilling and included part of it within the Act, the Board of Trade have no power to bring the rest of that trade within the Act. The Board of Trade have only power, under s. 103, to make an Order extending Part II. of the Act "to workmen in any trade other than an insured trade." They have no power to bring in part of a trade; they can only bring in a "trade." Therefore the Board of Trade have no power to deal with the sawmilling trade, as it is not a trade "other than an insured trade." The draft Order is therefore ultra vires.

Further, even if the Board of Trade have power to do so, the draft Order is ultra vires. It does not merely extend the provisions of Part II. of the Act to workmen in the trade of sawmilling not carried on in connection with any other insured trade. It includes all sawmilling whether carried on in connection with any other insured trade or not. It thus brings within Part II. of the Act sawmilling as one single trade though part of that which is so brought in has been already dealt with by the Legislature and brought within Part II. as a separate trade for the purposes of the Act. The Board of Trade have no power to deal with the part of the trade already dealt with by the Act. They have only power under s. 103 to bring in a trade "other than an insured trade." The Order therefore, so far as it deals with an insured trade, is ultra vires. The object of making the Order in this form is to bring within Part II. sawmilling as one trade, and so to be able to adduce evidence of

unemployment throughout the whole of that trade. If sawmilling not carried on in connection with any other insured trade is brought in as a separate trade, the evidence as to unemployment will be confined to that trade, and the appellants will be able to adduce evidence that there is no unemployment in that branch of the trade. The inquiry before the Commissioner ought to be as to the desirability of making that branch of sawmilling a separate insured trade, and the evidence should be confined to that branch of the trade. The matter is therefore one of great importance to the appellants.

Next, the Commissioner had jurisdiction to decide whether the draft Order was or was not ultra vires. By the proviso to s. 103 the Order shall not be made if the person holding the inquiry "reports that the Order should not be made"; and by s. 81, sub-s. 1, of the Factory and Workshop Act, 1901, which is incorporated by s. 113 and the Ninth Schedule, the Board of Trade may appoint a competent and impartial person to hold an inquiry with regard to any draft Order and report to them thereon. By s. 113, sub-s. 2, the draft Order must be laid before each House of Parliament for thirty days before it comes into force. The Commissioner, as the "competent and impartial person," is given power to say why the Order should not be made, including in that the power to say that the Order should not be made on the ground that it is ultra vires. The Act having provided the remedy for any one who objects to the draft Order, there is no other remedy, and the decision of the Commissioner as to the validity of the Order is final and cannot be questioned in any subsequent proceeding.

Further, a writ of mandamus will not, in the circumstances of this case, be granted. The Commissioner is in a judicial position, and a mandamus will only be granted if he has wholly refused to perform his judicial duty; if he has heard and determined erroneously the Court will not interfere by mandamus: Shortt on Mandamus, pp. 256, 263, 295. The Commissioner has not declined to exercise his jurisdiction. He has exercised his jurisdiction under s. 103 and has reported that the Order should not be made. He has exercised the wide discretion given to him by s. 103. He has decided a question of substance, and

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not a preliminary point within the decision in *Reg.* v. *Richards.* (1) He has power to report that the Order should not be made upon any ground whatever, and he has made a report accordingly. A mandamus therefore ought not to issue.

Sir J. A. Simon, A.-G. (*A. J. Ashton, K.C.*, and *Branson*, with him), for the Board of Trade. The Commissioner considered that sawmilling as a trade was already included by clause 7 of the Sixth Schedule in the list of insured trades, and that therefore the Order was an extension, not to workmen in a trade other than an insured trade, but to workmen in an already insured trade, and was ultra vires. That is not so. Clause 7 brings within Part II. of the Act sawmilling of a particular kind, namely, sawmilling carried on in connection with any other insured trade. That is treated as a distinct trade for the purposes of Part II. of the Act. The Board of Trade desire to extend the provisions of Part II. to workmen in another trade, namely, sawmilling not carried on in connection with any other insured trade, and to make that trade an insured trade. The true construction of the draft Order is to add another insured trade to those already specified as insured trades in the Sixth Schedule. It extends the provisions of Part II. of the Act to a distinct trade not already within the Act. The Order does not deal with an already insured trade. That is the true meaning of the Order, and if there is any surplusage in the language it may be rejected. The object of adding the new trade is to get rid of the difficulty which arises of saying in any particular case whether a workman who is engaged in sawmilling is in an insured trade or not. For instance, a workman may be engaged in sawing a plank. If that plank is ultimately intended for a motor-car he is engaged in an insured trade, because clause 6 of the Sixth Schedule includes "construction of vehicles" as an insured trade. If, however, the plank is intended for a cabinet he is not engaged in an insured trade. That was found to be the difficulty in distinguishing between the various forms of sawmilling, and it was to get rid of that difficulty that the Board of Trade made this draft Order. There was no sinister intention of widening the field of evidence, though it is not admitted on any construction

(1) (1851) 20 L. J. (Q.B.) 351.

of the Order that evidence as to sawmilling in general is not admissible. That question, however, does not arise here.

Next, the Commissioner had no power to determine whether or not the Order is ultra vires. It is no part of his functions to decide anything as to the powers of the Board of Trade in the matter. By s. 103, if it appears to the Board of Trade that it is "desirable" to extend Part II. to workmen in a trade other than an insured trade, they may make a special Order to that effect; but the Order is not to be made if the "competent and impartial person" reports that it "should not be made." He must consider all the interests involved and whether it is desirable to make the Order and then report whether the Order should be made. He has no power to construe the Act and decide whether the Order is within the powers of the Board of Trade. Perhaps, as Lord Reading C.J. said (1), there might possibly be a case where the draft Order appeared to the Commissioner to be so flagrantly wrong that he might take notice of that and refuse to pursue the inquiry, and if in such a case the Court came to the conclusion that, though the Commissioner was wrong in taking upon himself to decide the preliminary point, his decision was right in law, the Court in their discretion would no doubt refuse to issue a mandamus for the purpose of a useless further inquiry. That may be so, but the Commissioner has no jurisdiction to consider the question of ultra vires. The "competent and impartial person" need not be a lawyer, and it cannot have been contemplated that a layman should determine the construction of the Act. For instance, the Board of Trade may make a special Order under s. 102, revising the rates of contribution, and the "competent and impartial person" appointed to inquire and report would probably be, not a lawyer, but an accountant. When the Order is sought to be enforced the person affected by it may say that he is not "liable" within the meaning of s. 101, sub-s. 2, of the Act. Mandamus is the proper remedy. *Reg.* v. *Richards* (2) shows that "if the inferior Court abstain from entering upon the merits in consequence of their arriving at a wrong decision upon a preliminary point, this Court will set them right." That is a well-established principle upon which a mandamus will issue.

(1) Ante, p. 144.

(2) 20 L. J. (Q.B.) 351.

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Here the Commissioner wrongly took upon himself to decide the preliminary point whether the Order was ultra vires, and this Court will set him right.

L. Sanderson, K.C., in reply.

BUCKLEY L.J. This is an appeal from an order of the Divisional Court directing a mandamus to issue to A. A. Hudson, K.C., to hear and determine the matter of a certain inquiry with regard to a draft extension Order made by the Board of Trade under s. 103 of the National Insurance Act, 1911.

It is necessary in the first place to examine the relevant provisions of the National Insurance Act, 1911. When that is done I do not think that there will be much difficulty in arriving at a decision in the case. The question arises under Part II., which deals with "unemployment insurance." Sect. 84, in that Part, provides that "Every workman who, having been employed in a trade mentioned in the Sixth Schedule to this Act (in this Act referred to as 'an insured trade'), is unemployed," and in whose case certain conditions are fulfilled, shall be entitled to what is called "unemployment benefit." I find there a definition for the purposes of the Act of "an insured trade." It is a trade mentioned in the Sixth Schedule. Sect. 103 provides: "If it appears to the Board that it is desirable to extend the provisions of this Part of this Act to workmen in any trade other than an insured trade . . . : the Board may, with the consent of the Treasury, make . . . . a special Order extending this Part of this Act to such workmen," and there is a proviso that no such Order shall be made if the person holding the inquiry in relation to the Order reports that it should not be made. The Sixth Schedule contains a "list of insured trades for the purposes of Part II. of this Act relating to unemployment insurance." So that s. 103 is addressed to that which s. 84 has said is in the Act called "an insured trade," namely, a trade mentioned in the Sixth Schedule. There are seven trades mentioned in that schedule, of which the seventh is "sawmilling (including machine woodwork) carried on in connection with any other insured trade or of a kind commonly so carried on." That which is described by those words is therefore "an insured trade." The trade described is not all saw-

milling. It is a branch of sawmilling—sawmilling with a qualification. That branch of sawmilling is, for the purposes of the Act, an insured trade.

The Ninth Schedule of the Act contains provisions relating to the inquiry mentioned in s. 103. It incorporates ss. 80 and 81 of the Factory and Workshop Act, 1901, as set out and adapted in that schedule. Sect. 80, sub-s. 1, provides that before the authority—the Board of Trade—empowered to make special Orders make any special Order they shall publish certain notices. Sect. 81, sub-s. 1, provides that "the authority may appoint a competent and impartial person to hold an inquiry with regard to any draft Order, and to report to them thereon." Then follow provisions as to the mode of holding the inquiry. For the purpose of the present inquiry Mr. Hudson was appointed Commissioner. His duty was to hold an inquiry with regard to a certain draft special Order and to report to the Board of Trade thereon. Under the power conferred by s. 103 the Board of Trade made a special Order, headed "Draft Special Extension Order," the operative part of which runs thus: "The Board of Trade hereby extend the provisions of Part II. of the National Insurance Act, 1911, subject to the modification hereinafter contained, to the workmen in the trade of:—Sawmilling, including machine woodwork, whether carried on in connection with any other insured trade or not."

This brings me to the question of the proper construction of the Order. The Sixth Schedule contains, as I have already pointed out, in clause 7 a particular branch of sawmilling. The Order proposes to extend that. I should expect to find that that which is to be added by way of extension is exclusive, and not inclusive, of that which is already contained in clause 7. To my mind the meaning of the Order is as follows: Sawmilling carried on in connection with any other insured trade is already an insured trade. The Board of Trade propose to extend the trades mentioned in the Sixth Schedule by adding another trade, namely, sawmilling not carried on in connection with any other insured trade. This is the extension. The effect of the Order is to add to the branch of sawmilling mentioned in clause 7 another insured trade, which I may read as clause 8, namely, sawmilling

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not carried on in connection with any other insured trade. In my opinion the language of this Order means the same as if it had read "Sawmilling (including machine woodwork) not carried on in connection with any other insured trade."

Upon the inquiry before the Commissioner a question was discussed as to the true effect of the Order which I have just been considering. That is a matter depending upon the construction of the Act and Order, and upon that construction the Commissioner could in no sense adjudicate. It was not within his jurisdiction. It was not for him to determine as between the parties what the effect of the Order was. His duty was, taking the Order as valid, to hold the inquiry under the Act and to report whether the Order should or should not be made. The matter took this course. The Commissioner formed the opinion that the Order did not bear the construction I have put upon it, but bore another construction, and that upon the footing of that construction the Order was ultra vires. He said that he "ought to report to the Board of Trade under the proviso to s. 103 that this Order should not be made on the ground that it does not extend the provisions of Part II. of the Act to workmen in any trade other than an insured trade, sawmilling being already included in the list of insured trades for the purposes of Part II. of the Act by clause 7 of the Sixth Schedule thereof." He was deciding that the Order was ultra vires the Board of Trade. That he could not decide. I am far from saying that it was not a matter which, if raised, he might properly take into consideration for the purpose of saving costs and expense. He says a little later: "I feel that an additional burden is placed upon me in stating my views at present so as to save the enormous cost and expense which would be occasioned by the carrying on of this inquiry, which might all come to nothing if I were right in the views which I hold." Having formed the opinion that the Order was not authorized by the Act, his proper course would have been to decline provisionally to proceed. Instead of doing that he said that he ought to report to the Board of Trade under the proviso to s. 103 that the Order should not be made. He could only do that upon the footing that it was a good Order, but was one which upon the facts proved before him it was not

desirable to make. What he was determining or expressing an opinion upon was that it was not an Order at all. Upon that ground he declined to proceed. That was a wrong ground. No complaint is made that the Commissioner took a course which is in any way unjustifiable in declining to proceed with the inquiry. He had a difficult matter before him, and he thought that he was saving expense by so doing.

The Divisional Court ordered a mandamus to issue. Whether they were right in so doing depends upon the construction of the Order. If it bears the construction which I have placed upon it, it is a valid Order, and it is for the Commissioner to report, having regard to the facts which may be proved before him, whether the Order is one which should be made.

It is said by the appellants that the object of making the Order in this form is to enable the Board of Trade to enlarge the field of evidence before the Commissioner. They say that, if the Order receives the narrow construction which I think ought to be placed upon it, the only relevant evidence will be that relating to workmen in the particular trade added by way of extension, and that evidence relating to workmen engaged in sawmilling generally as one trade ought not to be admitted. As to that it is not necessary to say anything at present. When the matter comes before the Commissioner it will be for him to determine, reading the Order as construed by this Court, what is relevant evidence upon the inquiry. It does not arise at present, and I leave it undetermined.

There only remains the question whether this is a case for a mandamus. Upon that I cannot feel any doubt. The Commissioner, taking upon himself to place a construction upon the Order and to say that the Order so construed was ultra vires, declined upon that ground to proceed with the inquiry which he was appointed to hold. He declined to exercise the jurisdiction which it was his duty to exercise. Upon the ordinary principles applicable to mandamus it is for the Court to say that he had jurisdiction and that he ought to have exercised it. He must therefore be ordered to do so.

Upon these grounds in my opinion the appeal fails and should be dismissed.

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PICKFORD L.J. I am of the same opinion. The mandamus is directed to the Commissioner appointed under the National Insurance Act, 1911, ordering him to hear and determine the matter of an inquiry as to a certain draft special Order made under s. 103 of the Act. Under that section the Board of Trade may, stating it shortly, by special Order extend Part II. of the Act to trades other than those which are specifically mentioned in the Act as insured trades. The Commissioner declined to proceed with the inquiry upon this ground: he said that the Order was ultra vires the Board of Trade, and that he should report to the Board of Trade that upon that ground the Order should not be made. I think that the effect of what he did, after discussion with counsel and largely at their request, was this, to refuse to go on with the inquiry until that question was decided. The draft special extension Order is this: "The Board of Trade hereby extend the provisions of Part II. of the National Insurance Act, 1911, subject to the modification hereinafter contained, to the workmen in the trade of:—Sawmilling, including machine woodwork, whether carried on in connection with any other insured trade or not." By reference to the Sixth Schedule of the Act it is seen that the sawmilling which is included in the Act as an insured trade is "sawmilling (including machine woodwork) carried on in connection with any other insured trade or of a kind commonly so carried on." The Commissioner construed the Order to mean that the Board of Trade extended the provisions of Part II. of the Act to all sawmilling whether included in the Act or not, and that therefore they were extending the provisions of Part II. to something which was already within the Act, coupled with something which was not. If that were the true construction of the Order, I think it would require consideration whether they had power to make such an Order; but in my opinion that is not the construction. Nor has that construction been contended for by the Board of Trade. I think that the proper construction of the draft Order is that the Board of Trade extend the provisions of Part II. of the Act to sawmilling not carried on in connection with any other insured trade. Therefore that which is being added is not all saw-

milling, but only sawmilling not carried on in connection with any other insured trade. That is the trade which, in my opinion, this Order proposes to add, and that is within the powers of the Board of Trade. The point may have some practical importance if the trade to be added by this Order is all sawmilling, both that carried on in connection with any other insured trade and that not so carried on. It is obvious that in considering whether such an Order as that ought or ought not to be made evidence as to both branches of the trade would necessarily be relevant. If, on the other hand, the Order means, as I think it does, that the trade proposed to be added is sawmilling not carried on in connection with any other insured trade, it is by no means so obvious that evidence as to the other branch of the trade will be relevant. It may or may not be. No one can decide whether it is or is not until it is known what the evidence is, but it is obvious that different considerations may arise, and although prima facie evidence relating to another branch of a trade would not be of very great importance, yet the evidence may be such as to be relevant and important, and that the Commissioner will have to consider at the proper time. That being, in my opinion, the proper construction of the Order, it is within the powers of the Board of Trade, and the Commissioner, in deciding that he would not go on because he considered that the Order was ultra vires, came to an erroneous decision upon that which I think is not incorrectly described by the Lord Chief Justice in the Court below as a preliminary point. (1)

The next question is whether the Commissioner had jurisdiction to decide the question of ultra vires. Was that one of the matters left to him to determine? For the reasons given by Buckley L.J. I do not think that it was. I do not propose to repeat those reasons. At the same time I think that where a person in the position of the Commissioner sees, as he thinks, such a defect in the Order as to make the whole inquiry abortive, it is not improper for him to say that there is no use in incurring expense, which may all be thrown away, in proceeding with the

(1) Ante, pp. 143, 144.

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inquiry until that question is decided by the Court. That is a proper position to take up. It is not determining the question; it is merely taking notice of it in a sensible and proper way in order to save time and expense. I think, therefore, that the Commissioner took the proper course in saying that he would not proceed with the inquiry. He was wrong, however, in deciding that the Order was ultra vires the Board of Trade and upon that ground refusing to proceed.

As regards the question whether a mandamus will lie in such a case as this, it seems to me to be quite clear that it will, and I do not think it necessary to repeat what has been said upon this by the Divisional Court and by Buckley L.J.

The appeal must be dismissed.

BANKES L.J. I agree with the judgments which have been delivered, and have very little to add. It seems to me that the main point in this case is as to the true construction of the Order of the Board of Trade. In my opinion the Commissioner placed a wrong construction on the Order. Sect. 103 of the National Insurance Act, 1911, gives the Board of Trade power to extend the provisions of Part II. of the Act to workmen in any trade other than an insured trade. The insured trades set out in the Sixth Schedule to the Act include sawmilling, but not all sawmilling. The schedule includes sawmilling with a very important qualification, namely, sawmilling carried on in connection with any other insured trade. The object of the Board of Trade in making this Order is apparently to strike out that qualification. Their desire is that all sawmilling shall be included in the list of insured trades, and for that purpose this Order was drafted. The draftsman who had to put this intention into language might have adopted a form of words to the effect that all sawmilling other than that already included in the schedule should be an insured trade, or he might have adopted a form of words which nullified, as it were, the qualification. He has adopted the latter method of expressing the intention. It is said that that has been done with the sinister object of putting the Board of Trade in a better position for presenting their case to the Commissioner in the event of there being any opposition to the Order. I do not

know whether that is so or not. It has been disclaimed by the Attorney-General, and I have no concern with it. In my opinion the form of words adopted does not put the Board of Trade in any substantially different position from that they would have been in if the other form had been adopted. The only point for consideration, as it seems to me, is whether the draft Order is capable of the construction which counsel for the Board of Trade contend ought to be put upon it. If it is capable of that construction, that construction ought to be adopted because it makes the draft Order valid. In my opinion it is clearly capable of that construction, and I think that the words "sawmilling, including machine woodwork, whether carried on in connection with any other insured trade or not," mean that the qualification is intended to be got rid of, and that a new insured trade is to be added to the Sixth Schedule, namely, sawmilling not carried on in connection with any other insured trade, which up to that time had been excluded. It does not go through the unnecessary farce of adding to the schedule something which is already there. If that is the right view of the construction of the draft Order, all the difficulties which presented themselves to the mind of the Commissioner disappear.

There is one other point which I desire to mention. It was contended that the Commissioner had jurisdiction to decide whether this Order is ultra vires. In my opinion he had not. I think it is a matter of congratulation that he had not, because if he had jurisdiction it might be said, as indeed it has been said, that, when once he had come to a conclusion upon the matter and decided that the Order was intra vires, it would for ever afterwards be incompetent for either an employer or a workman to challenge the validity of the Order which had been made. I think it is most important, with regard to an Order like this and any other similar Order which a Government department is given statutory power to make, that the right of the person affected by the Order to challenge its validity when it is sought to be enforced against him should be preserved to the fullest extent. In my opinion it would be most unfortunate if a construction were to be put upon this Act which would enable a Commissioner to make an Order of the Board of Trade valid

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which, but for his intervention, could have been successfully challenged when it was sought to be enforced. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Busk, Mellor, & Norris, for Vaudrey, Oppenheim & Mellor, Manchester.*

Solicitor for Board of Trade: *Sir R. Ellis Cunliffe.*

W. F. B.

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YORKE *v.* THE KING.

Pension—Superannuation Allowance—Public Service—Jurisdiction of Court—Superannuation Act, 1834 (4 *&* 5 *Will.* 4, *c.* 24), *s.* 30—*Superannuation Act*, 1859 (22 *Vict. c.* 26), *s.* 2.

Under the Superannuation Acts, 1834 and 1859, the decision of the Commissioners of the Treasury, either as to whether a person is entitled to a superannuation allowance or as to the basis upon which an allowance shall be calculated, is final, and no Court of law has jurisdiction in the matter.

Cooper v. *The Queen* (1880) 14 Ch. D. 311 followed.

DEMURRER to petition of right of Sir Horatio Arthur Yorke.

The petition showed that in 1892 the suppliant, then a major on the active list in the Army, was appointed an inspecting officer of railways under the Board of Trade; that he continued on the active list of the Army till August 6, 1899, on which date, having in the meantime attained the rank of lieutenant-colonel, he retired from the Army and became entitled to retired military pay at the rate of 450*l.* per annum; that he continued to hold his office under the Board of Trade, and on April 22, 1900, he was appointed chief inspecting officer of railways, which office he held till the date of his retirement from the Civil Service under the age limit on June 30, 1913. At the date of his retirement the suppliant had completed thirteen years of service in the Permanent Civil Service, and he contended that the superannuation allowance to which he was entitled under s. 2 of the Superannuation Act, 1859, amounted to thirteen-sixtieths of the

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annual salary and emoluments of his office. During the holding of his office the suppliant continued to draw his non-effective pay as an officer amounting to 450*l.* per annum, and the profits of his office were abated by a like sum under and by virtue of s. 6 of the Superannuation Act, 1887, and the rules made thereunder. The salary and emoluments of his office as chief inspecting officer of railways amounted to 1400*l.* per annum, and in the returns made annually to Parliament under the Superannuation Act, 1887, the emoluments of the civil employment payable to the suppliant in respect of his office were assessed at 1400*l.* per annum. Upon his retirement from office he was awarded by the Treasury a pension of 205*l.* 16*s.* 8*d.*, being at the rate of thirteen-sixtieths of 950*l.*, whereas, as he contended, it should have been calculated upon the basis of thirteen-sixtieths of 1400*l.*, and should therefore have amounted to 303*l.* 6*s.* 8*d.* He accordingly prayed, first, a declaration that the pension payable to him in respect of his said office should be calculated upon the basis of thirteen-sixtieths of 1400*l.*, and, secondly, payment of any arrears that might be found due to him on the said basis.

The Attorney-General, on behalf of His Majesty, put in a demurrer, objecting that the petition of right was bad in substance and in law in that it did not disclose a sufficient or lawful or any obligation on His Majesty towards the suppliant or any legal or equitable right of the suppliant against His Majesty cognizable by the Courts or enforceable therein.

Sir Stanley Buckmaster, *S.-G.*, and *G. A. H. Branson*, in support of the demurrer. This petition cannot be entertained by the Court as the Crown does not bind itself in any way to grant superannuation allowances. This is quite clearly enacted by the Superannuation Act, 1834, and the Superannuation Act, 1859. The former of these statutes made provision for the granting of superannuation allowances, but s. 30 enacts that "nothing in this Act contained shall extend or be construed to extend to give any person an absolute right to compensation for past services, or to any superannuation or retiring allowance under this Act, or to deprive the Commissioners of His Majesty's Treasury, and the heads or principal officers of the respective

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departments, of their power and authority to dismiss any person from the public service without compensation." The scale of allowances prescribed by the Act of 1834 was altered by s. 2 of the Superannuation Act, 1859, but s. 30 of the Act of 1834 was not repealed, and furthermore s. 2 of the Act of 1859 contains the following proviso: "Provided always, that if any question should arise in any department of the public service as to the claim of any person or class of persons for superannuation under this clause, it shall be referred to the Commissioners of the Treasury, whose decision shall be final." These sections clearly negative any legal right on the part of the suppliant in respect of his pension. Moreover, it was expressly decided in *Cooper* v. *The Queen* (1) that the Courts have no jurisdiction in this matter.

E. Grimwood Mears, for the suppliant. The Treasury having decided that the suppliant is entitled to a superannuation allowance under s. 2 of the Act of 1859, the Court is not precluded from saying that a mistake has been made in calculating the amount of the allowance. Sect. 30 of the Act of 1834 and the proviso to s. 2 of the Act of 1859 only deal with questions of status, as, for example, whether a particular person comes within the class entitled to a pension; they do not deal with such a question as is raised by the present suppliant, namely, the amount of the allowance. If the Crown's contention is right the scale of allowances prescribed by s. 2 might be entirely disregarded by the Treasury and civil servants be left without redress. *Cooper* v. *The Queen* (1) is distinguishable. In that case the suppliant had not served for the requisite period of ten years to enable him to claim the extra allowance and he did not base his claim upon any statutory right.

LUSH J. In this case the suppliant complains that, in calculating his superannuation allowance under the statute, the Commissioners of the Treasury have made a mistake and have not applied the correct principle in arriving at the amount which ought to be paid to him. He accordingly prays a declaration that his pension should be calculated on a basis different from that upon which it has in fact been calculated;

(1) 14 Ch. D. 311

he further asks for payment of any arrears that may be found due to him on that basis. To that the Crown have put in a demurrer, and the question is whether, accepting all the facts as stated by the suppliant, the suppliant has any right to come to this Court for relief and to ask it to enforce the payment to him of any excess over that which has been paid to him.

I have to look at the Superannuation Acts of 1834 and 1859 in order to see whether they have given a person placed in the position of the suppliant the right to come to this Court in a case like this. The Act of 1834 provides for the payment of superannuation allowances and compensation for past services and s. 9 prescribes the limit of the amount of such pensions. Then comes s. 30, by which it appears clear that the Legislature, although apparently conferring upon certain persons the right in certain circumstances to superannuation allowances, at the same time safeguards the position by enacting that that which might be thought to confer a legal right should not in fact be treated as so doing, and that the whole of those provisions with regard to pensions were not really the subject of legal right at all, but were entirely dependent upon what one may call the bounty of the Commissioners of the Treasury. The method of calculating these pensions was altered by s. 2 of the Superannuation Act, 1859, and that section contains the following proviso : " Provided always, that if any question should arise in any department of the public service as to the claim of any person or class of persons for superannuation under this clause, it shall be referred to the Commissioners of the Treasury, whose decision shall be final." Mr. Grimwood Mears for the suppliant contends that that proviso only means this, that if any question of the status of a person or class of persons shall arise as to his or their right to have a superannuation allowance, it shall be referred to the Commissioners of the Treasury, whose decision shall be final, and that I ought to limit the proviso in that way. I can see no ground for so limiting it. That proviso follows the same line of reasoning as s. 30 of the Act of 1834, and it was enacted to make it clear to those who claim to be entitled to pensions that their right is not a legal right, and that if any question arises either as to their status or as to the amount of

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their pension, or whatever it may be, that question shall be referred to the Commissioners of the Treasury, whose decision shall be final. Both the Act of 1834 and the Act of 1859 expressly provide that claims for pensions under those statutes cannot be enforced in a Court of law, but are claims which are dependent entirely upon the discretion and bounty of the Commissioners of the Treasury.

This question arose in *Cooper* v. *The Queen* (1), and there Malins V.-C. had to consider the effect of these two statutes, and to decide whether or not they ousted the jurisdiction of the Courts, or rather whether they conferred any legal right upon persons petitioning in respect of their pensions. At p. 315 the Vice-Chancellor said this: "A servant of the Government, therefore, has rights conferred on him; but all those rights are dependent entirely upon the bounty of the Commissioners, and in order to guard themselves, and to prevent claims like this from being made before the civil tribunals of the country, the Act provides, s. 30:" The Vice-Chancellor then read the section and continued: "The Crown, in fact, says 'This is what we intend to give you, but as a matter of bounty only, and you shall have no legal right whatever, and it is not intended to give any person an absolute right to compensation for past services or for allowances under this Act.' He must therefore depend upon the bounty of the Crown whether he is to have the whole amount or any part which the Commissioners may think fit, or what they will take into consideration, or what they will not." If any language can be clear and definite that is. The judgment seems to me to mean this, that s. 30 of the Act of 1834 does not relate only to the question whether the suppliant is entitled to a pension at all, but it covers the whole ground, including the calculation of its amount. The Vice-Chancellor then considered the Act of 1859 and said: "It virtually re-enacts the 30th section of the former Act, which provides that these shall not be legal rights; and to remove all possibility of doubt on the subject the second section provides that 'if any question should arise in any department of the public service as to the claim of any person or class of persons for superannuation under this clause, it shall

(1) 14 Ch. D. 311.

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be referred to the Commissioners of the Treasury, whose decision shall be final.'" Mr. Grimwood Mears very ingeniously sought to distinguish that case from this by saying that the suppliant in that case did not found his claim upon any legal right under the statute, and I was asked to disregard that decision and say that it did not cover a case like the present, and that the present suppliant has a right to have the calculation of his pension revised. I cannot consider whether a mistake has been made in the calculation of the suppliant's pension or not; I can only say that the suppliant has no legal right to ask this Court to decide either that he is entitled to a pension, or as to the basis upon which it should be calculated. The demurrer must be allowed with costs.

Demurrer allowed.

Solicitor for the suppliant: *F. W. Langton.*
Solicitor for the Crown: *Treasury Solicitor.*

J. S. H.

[IN THE COURT OF APPEAL.]

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KREGLINGER *v.* S. SAMUEL & ROSENFELD.
In re MERTEN'S PATENTS.

Alien Enemy—Right to sue—Liability to be sued—Right to appear and defend—Right of Appeal.

The test of a person being an alien enemy is not his nationality but the place in which he resides or carries on business. A person voluntarily resident in, or who is carrying on business in, an enemy's country is an alien enemy.

An alien enemy, unless he be within the realm by the licence of the King, cannot sue in the King's Courts.

An alien enemy may be sued in the King's Courts.

An alien enemy who is sued has a right to enter an appearance and to defend the action; he has also the right to appeal against any decision, final or interlocutory, that may be given against him. But an alien enemy who is plaintiff in an action commenced before the

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outbreak of war has no right of appeal; his right to appeal is suspended until the conclusion of peace.

Where an action is brought against an alien enemy resident in the enemy's country, who carries on a branch business in this country by means of an agent, leave may be given to the plaintiff to issue a concurrent writ and to make substituted service of a notice of the writ by service of the notice upon the defendant's agent in this country.

PORTER *v.* FREUDENBERG.

APPEAL of the plaintiff from an order made at chambers by Scrutton J. giving leave to issue a concurrent writ against the defendant, an alien enemy, and to serve notice of it upon the defendant at Berlin.

The action was brought to recover a quarter's rent due on September 29, 1914, under a lease made in 1903, at a rental of 625*l.*, of certain premises in Princes Street, Hanover Square. The defendant resided and carried on business as a mantle manufacturer at Berlin, in the Empire of Germany, and had for some time before the outbreak of war carried on a branch establishment at the above premises by means of an agent named Arthur Barnes. According to the plaintiff's affidavit, a quantity of stock was usually kept on the premises, but immediately before September 29, 1914, the whole of the stock, fixtures, and fittings was removed from the premises. On September 28 the keys of the premises were sent to the plaintiff by Barnes, and the plaintiff intimated that they would be held at the disposal of Barnes as the agent of the defendant.

After the issue of the writ the plaintiff applied at chambers to Scrutton J. for directions as to the manner of serving the writ upon the defendant in Berlin. Scrutton J. gave liberty to the plaintiff to issue a concurrent writ against the defendant and to serve notice of the writ upon him in Berlin.

The plaintiff appealed.

Cecil Fitch, for the plaintiff. This appeal raises substantially two questions; first, whether an alien enemy who owes a debt to a British subject can be sued at all, and, secondly, if he can, how he can be brought before the Court. On the first point it is submitted that the defence of "alien enemy," if there is such a

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defence, does not depend upon statute, and that there is no principle of the common law which forbids an enemy to be sued. The Proclamation of September 9, 1914, under the Trading with the Enemy Act, 1914, in paragraph 7 says that "Nothing in this Proclamation shall be deemed to prohibit payments by or on account of enemies to persons resident, carrying on business or being in our dominions, if such payments arise out of transactions entered into before the outbreak of war or otherwise permitted." That obviously contemplates that, where possible, alien enemies should be made to pay their debts. On the second point, Scrutton J. has given the plaintiff leave to serve notice of the concurrent writ out of the jurisdiction in Berlin; but such service is practically impossible, and the plaintiff asks for leave for substituted service of notice of the writ upon Barnes, the defendant's agent in England.

The defendant was not represented.

KREGLINGER *v.* S. SAMUEL & ROSENFELD.

Appeal from a similar order of Scrutton J. in chambers giving the plaintiffs leave to serve notice of a concurrent writ upon the defendants in Germany.

The plaintiffs were skin and hide merchants, carrying on business in London and at Antwerp. Before the outbreak of war they had entered into contracts for the sale of cargoes of hides from Australia to the defendants, who carried on business in London. Before the outbreak of war the defendants intimated that they did not intend to carry out the contracts. After the outbreak of war a writ was issued, and the plaintiffs claimed to have effected proper service of it upon the defendants by leaving it upon one Bonome, a person who appeared to be in control or management of the business here (see Order XLVIIIA, r. 3). Bonome entered a conditional appearance and applied to set aside the service. Scrutton J. set it aside upon the ground that one Alfred Cohen, who resided at Hamburg, was the sole proprietor of the business of S. Samuel & Rosenfeld, and therefore Order XLVIIIA, r. 3, did not apply, as there were not two or more partners carrying on business within the jurisdiction. In the plaintiffs' application, Scrutton J. gave leave to issue a concurrent

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writ against Alfred Cohen with liberty to serve notice of the writ at Hamburg, in Germany, but refused leave to make substituted service of the notice of the writ by serving it upon Bonome, thinking himself bound to refuse by reason of the decision in *Wilding* v. *Bean.* (1)

The plaintiffs appealed, asking the Court for leave to effect substituted service of the writ on Bonome.

Storry Deans, for the plaintiffs. The contract was a c.i.f. contract, and the defendants refused to accept delivery of the hides at Dunkirk. The contract was made at Bermondsey with the defendant firm in this country. The plaintiffs did not know that the person carrying on the firm's business in this country was a German subject at Hamburg. The plaintiffs ought to have leave for substituted service of notice of the writ on Bonome. By the Trading with the Enemy Proclamation No. 2, September 9, 1914, paragraph 3, "enemy" means "any person or body of persons of whatever nationality resident or carrying on business in the enemy country," and paragraph 6 provides that "where an enemy has a branch locally situated in British, allied or neutral territory, not being neutral territory in Europe, transactions by or with such branch shall not be treated as transactions by or with an enemy." Cohen resides at Hamburg and carries on business there. He also carries on business in London under the style of Samuel & S. Rosenfeld, Bonome managing the business here. The branch business in London comes within paragraph 6 of the Proclamation. Therefore the plaintiffs can transact business with the branch. Bonome, in his affidavit in support of the application to set aside the service of the writ upon him, stated that he managed the London branch of the Hamburg business. The service of the original writ upon Bonome was, as the facts subsequently turned out, wrong: *St. Gobain, Chauny and Cirey Co.* v. *Hoyermann's Agency* (2); Order XLVIIIA, r. 3. The plaintiffs in these circumstances ought to have leave for substituted service of notice of the concurrent writ. It is admitted that there is no rule of Court applicable to such a case. Where an enemy is plaintiff in such a case a plea

(1) [1891] 1 Q. B. 100. (2) [1893] 2 Q. B. 96.

in abatement was formerly the proper plea: Bullen and Leake's Precedents of Pleading, 3rd ed., p. 475; now an application should be made to stay proceedings. There is no authority upon the matter when the defendant is an enemy. The language of Order LXVII., r. 6, covers this case. Prompt personal service cannot be effected, and the Court may order substituted service. *Wilding* v. *Bean* (1), upon which Scrutton J. decided this case, turned on a wholly different point; the question there was as to substituted service of a writ in the ordinary form for service within the jurisdiction; that case does not affect the present one. The cases of *Ford* v. *Shephard* (2) and *Western Suburban and Notting Hill Building Society* v. *Rucklidge* (3) show that the Court has jurisdiction to make the order. An alien enemy can be sued, and the Court in its discretion will give facilities for effecting service of the writ.

The defendants were not represented.

In re MERTEN'S PATENTS.

Notice of motion asking the Court to set aside the notice of appeal of the Deutsches Mertens Gesellschaft from an order of Warrington J.

In this case Soldan & Co., Limited, an English company, had presented a petition for revocation of a patent granted to a German subject resident in Germany, of which patent the Deutsches Mertens Gesellschaft, a German company, were the owners. Warrington J. made an order for the revocation of the patent, but, if notice of appeal were given on or before August 28, 1914, the operation of the order was to be suspended until the hearing of the appeal. Notice of appeal was given on August 28, 1914, after the outbreak of war between this country and Germany.

The petitioners moved to set aside the notice of appeal on the ground that the defendants were alien enemies.

A. J. Walter, K.C., and *Courtney Terrell*, for the motion. The notice of motion asks for an order setting aside the notice of

(1) [1891] 1 Q. B. 100. (2) (1885) 34 W. R. 63.
(3) [1905] 2 Ch. 472.

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appeal of the Deutsches Mertens Gesellschaft as invalid on the ground that the appellant company are and were at the date of their notice alien enemies of His Majesty and not competent to take any step in the proceedings. It is doubtful, however, whether this ought to be done, for an appeal is a step in an action and the enemy is in the position of a defendant. Before the Common Law Procedure Act, 1852, an appeal was by writ of error, but by s. 148 of that Act a writ of error was made unnecessary and the proceeding is a step in the cause: Lush's Practice, 3rd ed., vol. 2, p. 657. The law appears to be that if an alien enemy is brought into Court as a defendant he is entitled to appear and take any step in the action, including a right to appeal; although he has no right to appear as a plaintiff. The Mertens Company are in the position of defendants, and they appeared before Warrington J. before the war broke out, so it is difficult to say that they have no right to appeal. By the order of Warrington J. the patent is revoked, but the operation of the order is suspended until the appeal has been disposed of. If that suspension is removed, the plaintiffs will at once lodge the order, and the patent will be removed from the register, and it will not be possible to restore it without an Act of Parliament. But in the meantime, if the appeal is not heard and the order stands, the Mertens Company will keep their patent indefinitely. Therefore it is to the interest of the plaintiffs that the appeal should be heard. Alien enemies have been heard in this Court; for instance in *Janson* v. *Driefontein Consolidated Mines* (1), where rules on the subject were stated by Lord Davey. (2) In that case the alien enemies were plaintiffs.

[SWINFEN EADY L.J. The practice is that an order for revocation is registered on the application of the successful petitioner, and if the order is reversed by the Court of Appeal the order of that Court is entered on the register and the patent is thereby resuscitated: Frost on Patents, 4th ed., vol. 1, p. 307, relying on *Deeley* v. *Perkes* (3), and *In re Armstrong's Patent.* (4)]

(1) [1901] 2 K. B. 419; [1902] A. C. 484.
(2) [1902] A. C. at p. 499.
(3) (1896) 13 Rep. Pat. Cas. 581, 586.
(4) (1897) 14 Rep. Pat. Cas. 747, 755.

According to the usual practice the patent is not resuscitated by the order of the Court of Appeal. No distinction is suggested between appeals in patent cases and any other appeals, but it is submitted that the Court is competent to hear this appeal, and the petitioners object to having it kept hanging over their heads. Alien enemies can be sued, though they cannot sue: Lush's Practice, 3rd ed., vol. 1, p. 6.

Hon. H. Fletcher Moulton, for the Mertens Company. The company has been brought here to meet a motion which asks that its notice of appeal should be struck out, and it would probably have asked that the appeal should stand over till the end of the war. Now its right to appeal is admitted. It is not, however, to its interest to contend that the appeal should be heard during the war. It is preferred that it should stand over on the ground that the company cannot as an alien enemy take any step in the proceedings: *Albretcht* v. *Sussmann* (1); *Robinson* v. *Continental Insurance Co. of Mannheim.* (2) The Mertens Company are still in the position of defendants as they were in the Court below; they can take the step of appealing, but the matter should stand over till after the war. [He also cited Order LVIII., r. 1].

Sir J. A. Simon, A.-G. (*Branson* and *Nesbitt* with him), as amicus curiae. (3) In the first place, it is necessary to ascertain clearly what is meant by the term "alien enemy." For this purpose an "alien enemy" does not mean a subject of a State at war with this country, but a person of whatsoever nationality who is carrying on business in the enemy's country. The test is the hostile character of the person, and the question for consideration is where he is resident; so that a registered alien would not come within the meaning of the expression: see *Janson* v. *Driefontein Consolidated Mines* (4), where Lord Lindley says: "But when considering questions arising with an alien enemy, it is not the nationality of a person, but his place of business during war that is important": see too *McConnell* v. *Hector.* (5) Next comes the question, is an alien enemy entitled

(1) (1813) 2 V. & B. 323.
(2) Ante, p. 155.
(3) The Attorney-General appeared and argued in all three appeals.
(4) [1902] A. C. 484, at p. 505.
(5) (1802) 3 Bos. & P. 113.

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to sue in the Courts of this country? The authorities show that an alien enemy carrying on business here sub protectione regis is entitled to sue: *Wells* v. *Williams* (1); but it is not enough that the subject of a hostile State is here at large, if the Government does not know that he is here: *Boulton* v. *Dobree* (2); a prisoner of war, however, may sue on a contract entered into as such prisoner: *Sparenburgh* v. *Bannatyne* (3); *Maria* v. *Hall.* (4) [He also cited *Sylvester's Case* (5); *Brandon* v. *Nesbitt* (6); *The Hoop* (7); *Alciator* v. *Smith* (8); *Le Bret* v. *Papillon* (9); *Alcinous* v. *Nigreu* (10); *Shepeler* v. *Durant* (11); *The Möwe.* (12)] A long line of authorities establishes two propositions: that the test of disqualification as an alien enemy is not dependent merely on birth, and an alien enemy commorant in this country is entitled to be heard. Again, is an alien enemy defendant entitled to defend? There is not to be found in the whole series of cases the slightest suggestion that, if notice can be given him of the proceedings taken against him, he cannot come and be heard. The difficulty arises from the practice; a plaintiff is not entitled to serve a writ out of the jurisdiction, nor is it possible to serve notice of the writ in the enemy's country. But the difficulty may be got over in cases where the alien enemy defendant has in this country a manager who can have notice given to him. For the proposition that an alien enemy who is sued in our Courts can appear and defend, see Bacon, Abridgment, 7th ed., vol. 1, p. 183; *Albretcht* v. *Sussmann* (13); *Ex parte Boussmaker* (14); *Barrick* v. *Buba* (15); Story's Equity Pleadings, par. 53; *MacVeigh* v. *United States.* (16)

The authorities show that, though an alien enemy cannot sue in the Courts of this country, he can be sued. Sir Thomas Plumer

(1) (1697) 1 Ld. Raym. 282; 1 Salk. 46; 1 Lutw. 34.
(2) (1808) 2 Camp. 163.
(3) (1797) 1 Bos. & P. 163.
(4) (1800) 2 Bos. & P. 236; 1 Taunt. 33.
(5) (1702) 7 Mod. 150.
(6) (1794) 6 T. R. 23.
(7) (1799) 1 C. Rob. 196; 1 Eng. Prize Cas. 154.
(8) (1812) 3 Camp. 245.
(9) (1804) 4 East, 502.
(10) (1854) 4 E. & B. 217.
(11) (1854) 14 C. B. 582.
(12) [1915] P. 1.
(13) 2 V. & B. 323.
(14) (1806) 13 Ves. 71.
(15) (1857) 2 C. B. (N.S.) 563.
(16) (1870) 11 Wallace, 259.

V.-C. so stated the law in *Albretcht* v. *Sussmann* (1), where he referred to an unreported decision of the Court of Exchequer to the effect that the plea of an alien enemy would not hold to a bill of discovery in aid of a defence at law. Therefore the alien enemy succeeded in maintaining a bill of discovery in aid of his defence to an action at law. In *Daubigny* v. *Davallon* (2) it was held that a plea of alien enemy was a good plea to a bill of discovery in aid of an intended action at law by the alien enemy. That went upon the principle that the alien enemy cannot sue and therefore cannot have aid from the Courts in support of an action by him. But he could have a bill of discovery as a shield to protect himself against an action brought against him. In Dicey on Parties to an Action, p. 2, it is stated, as an exception to the rule that "all persons can sue and are liable to be sued in an action at law," that "felons, outlaws, and alien enemies cannot sue." In *Hastings* v. *Blake* (3) the principle is stated thus: "Men attaint or outlawed shall be put to answer in any action against them, because it is to their prejudice; but in an action brought by them they shall not be answered, because it is to their benefit." *Hall* v. *Trussell* (4) and *Ramsden* v. *Macdonald* (5) show that such a person can be sued. In *Ex parte Boussmaker* (6) an alien enemy was allowed to prove for a dividend in bankruptcy on a contract made before war, the dividend, however, not being paid over. That decision was founded on convenience so as to allow of the bankrupt's estate being distributed among the creditors. The proposition that an alien enemy cannot sue is also laid down in Co. Litt. 129b; Story's Equity Pleadings, 10th ed., ss. 51, 52; and, if sued, he ought to be admitted to defend and can appeal: *MacVeigh* v. *United States* (7); *Robinson* v. *Continental Insurance Co. of Mannheim.* (8) [He also referred to *Verney, otherwise Joyner's, Case.* (9)]

There remains to be considered the effect of, and the proper construction of, paragraph (*h*) of art. 23 of cap. 1 of s. 2 of the

(1) 2 V. & B. 323.
(2) (1794) 2 Anstr. 462.
(3) (1596) Noy, 1.
(4) (1603) Moore, 753.
(5) (1748) 1 Wils. 217.
(6) 13 Ves. 71.
(7) 11 Wallace, 259.
(8) Ante, p. 155.
(9) (1565) 2 Dyer, 245b.

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Annexe to the Hague Convention of 1907.(1) The question is whether the Convention is to be construed by looking at paragraph (*h*) by itself, or whether that paragraph should be read in conjunction with the rest of the article. It is submitted that the latter construction is right and that, having regard to the nature of the context in which it stands, it must be taken as limited to the proceedings of armies in the field; it is part of an article dealing with the limitation of the rights of belligerents on land to injure the enemy. [He referred to Pearce Higgins on The Hague Peace Conferences, p. 235; T. E. Holland in *Law Quarterly Review* (1912), vol. 28, at p. 94; Von Ullmann's Völkerrecht, 2nd ed., at p. 474; Bonfils' Manuel de Droit International Public, 5th ed., at p. 651; Pitt Cobbett's Cases and Opinions on International Law, 3rd ed., Part II., pp. 85, 86; Bentwich on the Declaration of London; Westlake on International Law, 2nd ed., Part II.]

Cur. adv. vult.

1915. Jan. 19. The judgment of the COURT (Lord Reading C.J., Lord Cozens-Hardy M.R., Buckley L.J., Kennedy L.J. (2), Swinfen Eady, Phillimore, and Pickford L.JJ.) was read by

LORD READING C.J. Before determining the respective merits of these three appeals it would best serve the public interest to examine the law relating to proceedings in the King's Courts by or against alien enemies during a state of war, so that conclusions might be drawn which would be a guide to the solution of some of the present day problems. In the first and second appeals the respondents had not been served and were not represented. Having regard, however, to the importance of the propositions of law to be discussed, the Attorney-General, acting as amicus curiae upon the invitation of the Court, undertook the burden of presenting the law in all its aspects. We are much indebted to him for his valuable assistance.

The main questions to be considered are, first, the capacity of

(1) The provisions of art. 23 will be found set out verbatim in the judgment, post, p. 875.

(2) Kennedy L.J. died two days before the judgment was delivered, but had read and approved it before his death.

alien enemies to sue in the King's Courts; secondly, their liability to be sued; thirdly, their capacity to appeal to the Appellate Courts, and, generally, their right to appear and be heard in the King's Courts.

There is much learning to be found in the books in reference to the enforcement of civil rights of alien enemies. Pronouncements on the subject were delivered by great judicial authorities during the Napoleonic Wars and again during the Crimean War, and in reference to incidents arising out of those wars. Happily, with the exception of the South African War, there has been hitherto no occasion in recent times for the Courts to examine this branch of legal knowledge. It may therefore be useful to refer to some of the early authorities, although the main propositions of law have long been well settled.

It is necessary at the outset to keep clearly in mind the meaning of the term "alien enemy" when used in reference to civil rights and liabilities. Its natural meaning indicates a subject of enemy nationality, that is, of a State at war with the King, and would not in any circumstances include a subject of a neutral State or of the British Crown, but that is not the sense in which the term is used in reference to civil rights. Ever since the great case of *The Hoop* (1) the law has been firmly established as pronounced in the judgment of Lord Stowell (then Sir William Scott) that one of the consequences of war was the absolute interdiction of all commercial intercourse or correspondence by a British subject with the inhabitants of the hostile country except by permission of the Sovereign. (See also *Potts* v. *Bell*, per Lord Kenyon C.J. (2)) This branch of law was again considered as a result of the Crimean War, and Willes J., in delivering the judgment of the Court of Queen's Bench in *Esposito* v. *Bowden* (3), said: "It is now fully established that the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country and that such intercourse, except with the licence of the Crown, is illegal." This law was founded in earlier

(1) 1 C. Rob. 196. (2) (1800) 8 T. R. at p. 561.
(3) (1857) 7 E. & B. at p. 779.

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days upon the conception that all subjects owing allegiance to the Crown were at war with subjects of the State at war with the Crown, and later it was grounded upon public policy, which forbids the doing of acts that will be or may be to the advantage of the enemy State by increasing its capacity for prolonging hostilities in adding to the credit, money or goods, or other resources available to individuals in the enemy State. Trading with a British subject or the subject of a neutral State carrying on business in the hostile territory is as much assistance to the alien enemy as if it were with a subject of enemy nationality carrying on business in the enemy State, and, therefore, for the purpose of the enforcement of civil rights, they are equally treated as alien enemies. It is clear law that the test for this purpose is not nationality but the place of carrying on the business: *Wells* v. *Williams* (1); *McConnell* v. *Hector*, per Lord Alvanley C.J. (2); *Janson* v. *Driefontein Consolidated Mines* (3), per Lord Lindley. When considering the enforcement of civil rights a person may be treated as the subject of an enemy State, notwithstanding that he is in fact a subject of the British Crown or of a neutral State. Conversely a person may be treated as a subject of the Crown notwithstanding that he is in fact the subject of an enemy State. As Lord Lindley said in *Janson* v. *Driefontein Consolidated Mines* (3): "When considering questions arising with an alien enemy it is not the nationality of a person but his place of business during war that is important. An Englishman carrying on business in an enemy's country is treated as an alien enemy in considering the validity or invalidity of his commercial contracts. Again the subject of a State at war with this country but who is carrying on business here or in a foreign neutral country is not treated as an alien enemy; the validity of his contracts does not depend on his nationality nor even on what is his real domicile but on the place or places in which he carries on his business or businesses." Lord Lindley's statement was not intended to be, and is not, exhaustive. His Lordship, for the purposes of the appeal then before the

(1) 1 Ld. Raym. 282. (2) 3 Bos. & P. 113.
(3) [1902] A. C. at p. 505.

House of Lords, was considering the character of a trading corporation, and did not purport to deal with persons residing but not carrying on business in the enemy territory. Such a person is equally treated as an alien enemy provided he is voluntarily resident there, having elected to live under the protection of the enemy State. For the purpose of determining civil rights a British subject or the subject of a neutral State, who is voluntarily resident or who is carrying on business in hostile territory, is to be regarded and treated as an alien enemy and is in the same position as a subject of hostile nationality resident in hostile territory. Professor Dicey, in his treatise on Parties to an Action, at p. 3, states the law accurately in the following proposition: "Under the term 'alien enemy' are included not only the subjects of any State at war with us, but also any British subjects or the subjects of any neutral State *voluntarily* residing in a hostile country."

In ascertaining the rights of aliens the first point for consideration is whether they are alien friends or alien enemies. Alien friends have long since been, and are at the present day, treated in reference to civil rights as if they were British subjects, and are entitled to the enjoyment of all personal rights of a citizen, including the right to sue in the King's Courts. Alien enemies have no civil rights or privileges unless they are here under the protection and by permission of the Crown: Blackstone, 21st ed., vol. 1, c. 10, p. 372. Indeed, under the ancient common law, "debts and goods found in this realm belonging to alien enemies belong to the King and may be seized by him": see Hale's Pleas of the Crown, vol. 1, p. 95. That the enemy's property was liable to confiscation is also shown by the privilege granted under c. 30 of Magna Charta to merchant strangers coming into this realm, whereby the privilege was conceded to merchants of a land making war against the Sovereign and found in this realm that they should be attached without harm of body or *goods* until it became known how English merchants were treated in the hostile State. If well treated, the enemy merchants were to be well treated here, so that confiscation of the enemy merchants' property would only occur by way of reprisal or retaliation. Whether the right of the Sovereign to

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confiscate any of the alien enemies' goods or debts in this realm was ever exercised or not (see *Wolff* v. *Oxholm* (1), per Lord Ellenborough), there can be no doubt about the existence of the right: see *Attorney-General* v. *Weeden*. (2) Gibbs C.J. in *Antoine* v. *Morshead* (3) affirmed the principle that the Crown during the war may lay hands on debts due to the alien enemy, but if it do not, then on the return of peace the rights of the contracting alien are restored and he may himself sue to recover the debts: see also Walford's Parties to Action (mentioned later herein), at p. 653, and the authorities there cited from 19 Edw. 4 to *Antoine* v. *Morshead*. (3) The right of confiscation is only of importance to trace the history and foundation of our common law, since there is manifestly no question of exercising this right. The severity of the common law rule was, however, in early days relaxed in favour of those who had the King's permission to come here. So long ago as the year 1454 it would follow from the reported observations of Ashton J. (Year Book, 32 Hen. 6, 23 (b) 5) that if an alien enemy came here under the King's licence or a safe conduct he could maintain an action for trespass if any person took his goods from his house. Later, in 1697, in the case of *Wells* v. *Williams* (4) it was held that although an alien enemy came here in time of war and without a safe conduct yet, if he has continued to reside here by the King's leave and protection, he may be allowed to sue in the King's Court, for such a right is consequent to the protection offered him. In Coke upon Littleton (19th ed. vol. 1, p. 129 (a)) it is stated that an alien enemy cannot maintain a real or personal action until both nations are at peace. An editorial note (A.D. 1832) adds that "On declaring war the King usually in the proclamation of war qualifies it by permitting the subjects of the enemy resident here to continue so long as they peaceably demean themselves; and without doubt such persons are to be deemed alien friends in effect." The passage in Bacon's Abridgement (7th ed. vol. 1, p. 183) dealing with aliens is of similar effect: "If an alien enemy comes here

(1) (1817) 6 M. & S. 92, at p. 102.
(2) (1699) Parker, 267.
(3) (1815) 6 Taunt. 237.
(4) 1 Ld. Raym. 282 (also reported in 1 Lutw. 34, and 1 Salk. 46).

sub salvo conductu he may maintain an action; so if an alien amy comes here in time of peace per licentiam domini regis as the French protestants did and lives here sub protectione and a war afterwards happens between the two nations he may maintain an action, for suing is but a consequential right of protection; and therefore an alien enemy who is here in peace under protection may sue a bond; aliter of one commorant in his own country." This passage is mainly based upon *Wells* v. *Williams* (1) and *Sylvester's Case.* (2) The decision in this last-mentioned case threw no doubt upon the principle of law, but held that in an action by an alien enemy, and when there was a plea in abatement of "alien enemy," it was incumbent on him to plead a replication that he was here under the protection of the Crown. Towards the end of the eighteenth century Lord Kenyon C.J., in delivering the judgment of the Court of King's Bench in *Brandon* v. *Nesbitt* (3), said that "An action will not lie either by or in favour of an alien enemy . . . ." and that the Court "had not found a single case in which the action had been supported in favour of an alien enemy. For though it was held in *Ricord* v. *Bettingham* (4) that the action by an enemy on a ransom bill might be maintained, the action was not brought until peace was restored, which gets rid of the objection." So clear a statement of the law was made by Lord Alvanley C.J. in *McConnell* v. *Hector* (5) that we quote it in extenso: "Most certainly every natural-born subject of England has a right to the King's protection so long as he entitles himself to it by his conduct, but if he live in an enemy's country he forfeits that right. Though these persons may not have done that which would amount to treason, yet there is an hostile adherence and a commercial adherence; and I do not wish to hear it argued that a person who lives and carries on trade under the protection and for the benefit of a hostile State, and who is so far a merchant settled in that State that his goods would be liable to confiscation in a Court of prize, is yet to be considered as entitled to sue as an English subject in

(1) 1 Ld. Raym. 282 (also reported in 1 Lutw. 34, and 1 Salk. 46).
(2) 7 Mod. 150.
(3) (1794) 6 T. R. 23.
(4) (1765) 3 Burr. 1734.
(5) 3 Bos. & P. 113.

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an English Court of justice. The question is whether a man who resides under the allegiance and protection of an hostile State for all commercial purposes is not to be considered to all civil purposes as much an alien enemy as if he were born there? If we were to hold that he was not, we must contradict all the modern authorities upon this subject. That an Englishman from whom France derives all the benefit which can be derived from a natural-born subject of France should be entitled to more right than a native Frenchman would be a monstrous proposition. While the Englishman resides in the hostile country he is a subject of that country, and it has been held that he is entitled to all the privileges of a neutral country while resident in a neutral country." The later cases of *Boulton* v. *Dobree* (1) and *Alciator* v. *Smith* (2), whilst affirming the principle already stated, decided that the burden was upon the alien enemy to establish that he was within this realm by the licence of the King, and, as the evidence was not sufficient in either case to discharge this burden, there was a nonsuit in both cases. During the Napoleonic wars it was thus firmly established that an alien enemy, unless here by permission of the King, could not sue in the King's Court. In a case arising out of the Crimean war, *Alcinous* v. *Nigreu* (3), the principle was again affirmed. The point arose on demurrer to the plea that the plaintiff was residing in this kingdom without the licence, safe conduct, or permission of the Sovereign. Lord Campbell C.J. held that the Court must take judicial notice that our Sovereign was at war with the empire of Russia and was of opinion that, as the contract was entered into before the war, the plaintiff could enforce it when peace was restored, but that by the law of England, so long as hostilities prevailed, a Russian subject who was here without the permission, express or implied, of the Sovereign could not sue here.

In Walford's treatise on the Law respecting Parties to Actions, published 1842, there is a chapter in vol. 1, p. 647, dealing with disabilities of civil origin which well repays close and diligent study. When treating of alien enemies the learned author at

(1) 2 Camp. 163. (2) 3 Camp. 245.
(3) 4 E. & B. 217.

p. 650 thus states the law: "Alien enemies are distinguishable according as they are under the King's special protection or not. If an alien enemy came here under a safe conduct or is commorant here by the King's licence and under his protection he seems to stand in the same position as to the right of maintaining actions in our Courts as an alien friend, a right of suing being an incidental right to protection"—that is, he is no longer under the disability attaching to an alien enemy.

Whenever the capacity of an alien enemy to sue or proceed in our Courts has come up for consideration, the authorities agree that he cannot enforce his civil rights and cannot sue or proceed in the civil Courts of the realm. The case of *Ex parte Boussmaker* (1), however, requires examination. In that case Lord Erskine, then Lord Chancellor, allowed alien enemies to enter a claim as creditors in a petition under a commission for bankruptcy on the ground that upon a return to peace the right to prove would survive, inasmuch as the debt arose from a contract made when the two nations were at peace. He came to the conclusion that it would be contrary to justice to confiscate the dividend, and as the right to recover was only suspended, that was not a reason why the fund available for the creditors should be divided among the other creditors without regard to the alien enemies' suspended rights. He therefore ordered that a claim be entered and the dividend of the alien enemy be reserved. The contention to which the Lord Chancellor there gave effect was that, in the administration of the fund in bankruptcy, the other creditors should not be permitted to take a larger dividend by the exclusion of the alien enemy. If the alien enemy could not take the dividend the Crown would be entitled to it. Under these circumstances the Lord Chancellor admitted, not a proof, but a claim. The result would be that there would be divided amongst the other creditors the differential sum remaining after reserving the dividend on the claim, and that, as his Lordship said, "upon the return of peace the right would survive and it would be contrary to justice to confiscate the dividend."

This differs from a case in which the alien enemy comes into Court to prove the existence of the debt and claim judgment for

(1) 13 Ves. 71.

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the amount. It must not, however, be regarded as an authority for the proposition that an alien enemy can present a petition to the Court and be heard upon it. There was no argument before the Lord Chancellor as to whether such a petition could be presented by an alien enemy, and the point does not appear to have been considered. According to the report of the case, no interest was represented before his Lordship except that of the petitioner, but from the record, which we have had the opportunity of examining, it appears that the assignees in bankruptcy were also represented. The petitioners' argument was that there was a valid debt, and that therefore a sufficient amount should be reserved from the fund to be distributed. The Lord Chancellor, having expressed the opinion that the contract was valid and the debt due, had nevertheless become aware that the alien enemy would be entitled on restoration of peace to payment of a dividend upon his debt, and his Lordship thought the right and convenient course was to enter the claim and reserve the amount until after the war. It is as if a trustee in bankruptcy, about to distribute funds arising from the debtor's estate to the creditors, received notice of a claim by an alien enemy and, having satisfied himself as to its validity, kept in his hands sufficient to pay a dividend on the debt after the conclusion of the war.

The latest adjudication upon the alien enemy's right to sue is *Princess Thurn and Taxis* v. *Moffitt* (1), where Sargant J. held that the subject of an enemy State who was registered under the Aliens Restriction Act, 1914, as an alien and the subject of an enemy State is entitled to sue in the King's Courts. This decision is in our opinion clearly right. Such an alien is resident here by tacit permission of the Crown. He has by registration informed the Executive of his presence in this country, and has been allowed thereafter to remain here. He is "sub protectione domini regis."

Having stated the common law of England in regard to the question of the alien enemy's right to sue in our Courts of law, we have now to consider whether the Hague Convention of 1907 upon the Laws and Customs of War on Land, article 23 (*h*) of chapter 1 of section 2 of the Annex entitled "Regulations

(1) (1914) 31 Times L. R. 24.

respecting the Laws and Customs of War on Land," has any bearing upon the questions we have to determine. The heading of that section is "Of Hostilities." Section 3 is headed "Military Authority over the Territory of a Hostile State."

Chapter 1 of section 2 is entitled "The Means of injuring the Enemy; Sieges and Bombardments." The articles in it are numbered from 22 to 28. Articles 22 and 23 are as follows:—

"Article 22.

"Belligerents have not an unlimited right as to the choice of means of injuring the enemy.

"Article 23.

"In addition to the prohibitions provided by special Conventions it is particularly forbidden

"(*a*) To employ poison or poisoned weapons;

"(*b*) To kill or wound by treachery individuals belonging to the hostile nation or army;

"(*c*) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;

"(*d*) To declare that no quarter will be given;

"(*e*) To employ arms, projectiles or material calculated to cause unnecessary suffering;

"(*f*) To make improper use of a flag of truce of the national flag or of the military insignia and uniform of the enemy as well as of the distinctive signs of the Geneva Convention;

"(*g*) To destroy or seize enemy property unless such destruction or seizure be imperatively demanded by the necessities of war;

"(*h*) To declare abolished, suspended or inadmissible the right of the subjects of the hostile party to institute legal proceedings.

"A belligerent is likewise forbidden to compel the subjects of the hostile party to take part in the operations of war directed against their own country even if they were in the service of the belligerent before the commencement of the war."

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The remaining articles refer to ruses of war, bombardments, sieges, and assaults.

The important paragraph is 23 (*h*):—"To declare abolished, suspended or inadmissible the right of subjects of the hostile party to institute legal proceedings."

It is desirable to give it also in French: "De déclarer éteints, suspendus, ou non recevables en justice les droits et actions des nationaux de la partie adverse."

This paragraph (*h*), in a form which was not substantially different, was originally introduced in one of the committees of the Hague Conference by General von Gündell, a German delegate, and Herr Göppert, another German delegate, undoubtedly stated in reference to it that the intention of the proposed clause was to prohibit all legislative measures which in time of war would place the subject of an enemy State in the position of inability to enforce the execution of a contract by recourse to the tribunals of the State in regard to which he is an alien enemy. The text of the paragraph must of course be interpreted by us as it now stands in the ratified Convention, and the intention of its proposer is immaterial, but it is only fair to add that the paragraph as originally proposed did not contain the words "en justice" and instead of the words "les droits et actions des nationaux" the words were "les réclamations privées des ressortissants." These changes of language appear, so far as they go, rather to be in accord with Herr Göppert's statement of the object of the proposal. They were, as we understand, made in the course of the drafting of the Annex without discussion or debate taking place in regard to them, and the paragraph as it now stands was submitted for the final approval of the Conference without any suggestion of their being in any way material.

The meaning and force of the paragraph have been subjected to a considerable discussion by learned writers upon international law in this country, in America, and on the Continent, and the Attorney-General in the course of his argument in this case both by reference and by citation placed us in possession of the most valuable of the opinions of those writers. It would in our view serve no useful purpose to attempt here any elaborate

examination of these opinions. Suffice it to say that the substantial question being whether the operation of this paragraph is or is not to abrogate the old rule (not peculiar to English law, though it has been more prominent in England than elsewhere) that an alien enemy's rights of action are suspended during the war, jurists of eminence have expressed widely divergent views upon the point, and this Court has given to those views its very careful consideration. We are all clearly of the opinion that the paragraph in question cannot be treated as effecting any such abrogation.

If we look in the first place at the terms of the paragraph itself and apart from its collocation and context, we find that what it forbids is, as also in paragraph (*d*), a "declaration":—"It is forbidden to declare." This has no application to a country in which, as in England, there is no room for a declaration. By the existing law of the country the mere fact of war operates ipso facto to suspend any rights of action which at the time of the outbreak of war any alien enemy may possess. It is interesting to observe that Dr. Sieveking, an eminent German jurist, whilst holding that the paragraph was intended to have all the effect foreshadowed by Herr Göppert, is of opinion that, as to England at any rate, it is ineffectual because it only prevents some executive authority from declaring that rights of action are suspended, extinguished, or inadmissible. He rightly points out that no such declaration is required in English law for the reason already given.

Extending our view from the paragraph itself to the immediate context, we find that it is included in a group of paragraphs forming article 23, every other of which relates solely to the conduct of a military force and its commanders in a campaign and not at all to the administration of the law respecting alien enemies at home; that the chapter of which the article forms part is entitled "Means of injuring the Enemy; Sieges and Bombardments," and that the section of the Annex to which the chapter belongs bears the general heading "Of Hostilities." Extending our view still further to the Convention itself, we find the declaration which governs the whole Annex and controls its application in article 1: "The contracting powers *will issue*

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to their armed land forces instructions which shall be in conformity with the 'regulations respecting the laws and customs of war on land' annexed to the present Convention."

It is impossible to suppose that this means (as it must do if the effect of the paragraph (*h*) is to abrogate the law existing hitherto in England and to give an alien enemy the position of a persona standi in judicio in English Courts of law) that the War Office of Great Britain shall in the present war for this purpose issue instructions to Sir John French, commanding our land forces in the field, forbidding him to "declare" that the rights of alien enemies—Germans, Austrians, or Turks—to institute legal proceedings in the High Court of Justice in London are suspended or inadmissible. And yet this absurdity seems necessarily to follow from the scheme of the Convention as applied to paragraph (*h*) if the interpretation of this paragraph is that which is contended for by those who find in it an abrogation of our law, which hitherto has not given to an alien enemy the position of a persona standi in judicio.

Our view is that article 23 (*h*), read with the governing article 1 of the Convention, has a very different and very important effect, and that the paragraph, if so understood, is quite properly placed as it is placed in a group of prohibitions relating to the conduct of an army and its commander in the field. It is to be read, in our judgment, as forbidding any declaration by the military commander of a belligerent force in the occupation of the enemy's territory which will prevent the inhabitants of that territory from using their Courts of law in order to assert or to protect their civil rights. For example, if the commander-in-chief of the German forces which are at the present moment in military occupation of part of Belgium were to declare that Belgian subjects should not have a right to sue in the Courts of Belgium, he would be acting in contravention of the terms of this paragraph of the article. If such a declaration were made, it would be doing that which this paragraph was intended to make particularly forbidden by the solemn compact between all the States which ratified the Hague Convention of 1907. According to eminent jurists the occupying military power is forbidden as a general rule to vary or suspend laws affecting

property and private personal relations : see Hall's International Law, 6th ed. p. 465. This article 23 (*h*) has now enacted that, whatever else the occupying military power may order in the territory of the enemy which it dominates, it shall not henceforth declare that the right of the subjects of the enemy to institute legal proceedings in the Courts of that territory is abolished, suspended, or inadmissible. If this be its true force, the enactment as an international compact is not only of high value, but it has been inserted quite naturally and appositively in the position in the section and the chapter of the Annex to the Convention which it occupies.

There are two matters brought before us by the learned Attorney-General in connection with the interpretation of article 23 (*h*) which, in our opinion, ought not to be left unnoticed. The first of these is the letter addressed on March 27, 1911, by our Foreign Office to Professor Oppenheim, of Cambridge, in answer to an inquiry made by him on the preceding February 28 in reference to the views which had been expressed in regard to the paragraph by some foreign jurists. The reply of the Foreign Office was published. It contains a powerfully reasoned exposition of the view that this paragraph has no concern with the municipal law but relates to the conduct of those who are in command of an army in occupation of the territory of an enemy.

The second matter is an incident of a diplomatic character. On the eve of the outbreak of the present war the German Ambassador in London addressed a communication to our Foreign Office to this effect: "In view of the rule of English law the German Government will suspend the enforcement of any British demands against Germans unless the Imperial Government receives within twenty-four hours an undertaking as to the continued enforceability of German demands against Englishmen." No arrangement was arrived at. We refer to these two incidents, not because either of them can affect our judgment on the question of the interpretation of article 23 (*h*), but because it is right that it should be made quite clear to every one that as early as the spring of 1911 the view of the British Government as to its true interpretation was made public to the

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world and that the situation was perfectly well understood by the German Government.

It is to be regretted that the paragraph should be so drawn as to give rise to controversy as to its proper interpretation, but, for the reasons given, we think the paragraph has not the extended meaning claimed for it and does not affect the ancient rule of the English common law that an alien enemy, unless with special licence or authorization of the Crown, has no right to sue in our Courts during the war.

Having now explained the meaning of "alien enemy" for civil purposes, and having decided that such alien enemy's right to sue or proceed either by himself or by any person on his behalf in the King's Courts is suspended during the progress of hostilities and until after peace is restored (see also *Flindt* v. *Waters* (1)), the next point to consider is whether he is liable to be sued in the King's Courts during the war. To allow an alien enemy to sue or proceed during war in the civil Courts of the King would be, as we have seen, to give to the enemy the advantage of enforcing his rights by the assistance of the King with whom he is at war. But to allow the alien enemy to be sued or proceeded against during war is to permit subjects of the King or alien friends to enforce their rights with the assistance of the King against the enemy. Prima facie there seems no possible reason why our law should decree an immunity during hostilities to the alien enemy against the payment of just debts or demands due to British or neutral subjects. The rule of law suspending the alien enemy's right of action is based upon public policy, but no considerations of public policy are apparent which would justify preventing the enforcement by a British or neutral subject of a right against the enemy. As was said by Bailhache J. in *Robinson & Co.* v. *Continental Insurance Co. of Mannheim* (2), "To hold that a subject's right of suit is suspended against an alien enemy is to injure a British subject and to favour an alien enemy and to defeat the object and reason of the suspensory rule." In our judgment the effect would be to convert that which during war is a disability, imposed upon the alien enemy because of his hostile character, into a relief to him

(1) (1812) 15 East, 260. (2) Ante, p. 155, at p. 159.

during war from the discharge of his liabilities to British subjects. It is very noteworthy that when dealing with the rights of alien enemies there is no shadow of doubt suggested in the books as to the right to sue alien enemies. More often there is no mention of it, but sometimes it is the subject of express reference and then always to the same effect, that the alien enemy can be sued during the progress of hostilities. Bacon's Abridgement, 7th ed., vol. 1, p. 183, asserts this liability of the alien enemy without doubt or hesitation. "The plea of 'alien enemy' is a bar to a bill for relief in equity as well as to an action at law, but it would seem not sustainable to a mere bill for discovery for *as an alien enemy may be sued at law* and may have process to compel the appearance of his witnesses so he may have the benefit of a discovery." This is an important passage in other respects also, and in our judgment it is a correct statement of the law. Walford, in his valuable work above mentioned on Parties to Actions, at p. 656 says: "With respect to the liabilities of aliens, whatever be their description, whether friends or enemies, whether with or without protection, they seem to be open to be sued just the same as native subjects, there being nothing in their character either originally to incapacitate them from contracting an obligation, or committing a civil injury, or to shelter them in any action brought against them in consequence." Sect. 53 of Story's Commentaries on Equity Pleading is of similar effect: "An exception might perhaps be allowed where the alien enemy is the defendant in a suit at law in the country where he brings the bill for discovery; since it may be the only effectual means on his part to establish a perfect defence to the suit at law." This passage shows that in the opinion of the learned author an alien enemy might be defendant in a suit. In Lush's Practice (1865, 3rd ed.), vol. 1, p. 6, it is stated that outlaws, aliens, enemies, felons, &c., are all liable to be sued Professor Dicey in his work on Parties to Actions has a passage to the same effect. Walford, at p. 666 of the treatise already mentioned, also expresses the opinion that a person attainted, outlawed, or excommunicated is open to be sued like an ordinary person, as he has already observed, like an alien friend or enemy.

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The Supreme Court of the United States had to consider the position of an alien enemy defendant in *McVeigh* v. *United States*. (1) The United States under a statute then in force filed a libel of information in the District Court of Virginia for the forfeiture of certain real and personal property of McVeigh on the ground that he was "a resident of the city of Richmond within the Confederate lines and a rebel." McVeigh appeared by counsel and filed a claim to the property and an answer. The Attorney of the United States moved that the claim and answer and appearance be stricken from the files, and the Court granted the motion and the decree was made for forfeiture of the property. The case eventually was brought to the Supreme Court on writ of error. Swayne J., in delivering the judgment of the Court, said: "The order in effect denied the respondent a hearing. It is alleged he was in the position of an alien enemy and hence could have no locus standi in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. . . . . Whether the legal status of the plaintiff in error was or was not that of an alien enemy is a point not necessary to consider; because, apart from the views we have expressed, conceding the fact to be so, the consequences assumed would by no means follow. Whatever may be the extent of the disability of an alien enemy to sue in the Courts of the hostile country, it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defence." The learned judge relied upon the above-mentioned passage in Bacon's Abridgement as an authority for this proposition, and the Supreme Court acted upon it by reversing the judgment of the District Court and of the Circuit Court.

Although there is no case in English law which has directly decided that an alien enemy can be sued in our Courts until the recent decision of Bailhache J., it is instructive to glance at cases dealing with forfeiture of civil rights resulting from some act of misconduct. The traitor, the felon, the outlaw, and the excommunicated person were under civil disabilities. They were held by their misconduct to have wiped out and obliterated the original

(1) 11 Wallace, 259.

traces of their character as citizens (see Walford, p. 647). Such misconduct generally speaking carried the same denial of the rights to sue in the Courts as attached to an alien enemy. In Noy's Reports (Noy was Attorney-General to Charles I.) this judicial observation occurs in *Hastings* v. *Blake* (1): "Men attaint or outlawed shall be put to answer in any action against them because it is to their prejudice: but in an action brought by them they shall not be answered because it is to their benefit." In *Ramsden* v. *Macdonald* (2) Lee C.J. said: "There is no doubt but a person attainted may be sued." These are not direct authorities to support the proposition now under discussion with reference to alien enemies, but they are instances to show that there is no reason in principle why a person attainted or outlawed should not be sued. These are cases arising, it is true, out of misconduct, but they involved the parties in the same disability to sue as attached to an alien enemy, and we are at a loss to conceive why the same liability to be sued should not equally apply to him. The real difficulty that arises in seeking to enforce a right against an alien enemy is that of fixing him with proper notice of the suit and the proceedings in the action, with which we will deal later.

Once the conclusion is reached that the alien enemy can be sued, it follows that he can appear and be heard in his defence and may take all such steps as may be deemed necessary for the proper presentment of his defence. If he is brought at the suit of a party before a Court of justice he must have the right of submitting his answer to the Court. To deny him that right would be to deny him justice and would be quite contrary to the basic principles guiding the King's Courts in the administration of justice.

Equally it seems to result that, when sued, if judgment proceed against him, the appellate Courts are as much open to him as to any other defendant. It is true that he is the person who may be said in one sense to initiate the proceedings in the appellate Court by giving the notice of appeal, which is the first necessary step to bring the case before that Court; but he is entitled to have his case decided according to law, and if the judge in one

(1) Noy, 1. (2) 1 Wils. 217.

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of the King's Courts has erroneously adjudicated upon it he is entitled to have recourse to another and an appellate Court to have the error rectified. Once he is cited to appear he is entitled to the same opportunities of challenging the correctness of the decision of the judge of first instance or other tribunal as any other defendant. The decision in *McVeigh* v. *United States* (1) in the Supreme Court of the United States is to the same effect. In that case the defendant, who was appellant in the circumstances already stated, brought writ of error in respect of the judgment of the District and Circuit Courts and succeeded in reversing the judgments of those Courts.

We must now consider whether the same conclusion is reached in reference to appeals by an alien enemy plaintiff, that is, a person who before the outbreak of war was a plaintiff in a suit and then by virtue of his residence or place of business became an alien enemy. As we have seen, he could not proceed with his action during the war. If judgment had been pronounced against him before the war in an action in which he was plaintiff, can he present an appeal to the appellate Courts of the King? We cannot see any distinction in principle between the case of an alien enemy seeking the assistance of the King to enforce a civil right in a Court of first instance and an alien enemy seeking to enforce such right by recourse to the appellate Courts. He is in either case seeking to enforce his right by invoking the assistance of the King in his Courts. He is the "actor" throughout. He is not brought to the Courts at the suit of another, it is he who invokes their assistance; and it matters not for this purpose that a judgment has been pronounced against him before the war. When once hostilities have commenced he cannot, so long as they continue, be heard in any suit or proceeding in which he is the person first setting the Courts in motion. If he had given notice of appeal before the war, the hearing of his appeal must be suspended until after the restoration of peace.

Having now dealt with general principles, we proceed to consider their application to the three appeals before us. The plaintiff in the first appeal issued a writ against one Philip

(1) 11 Wallace, 259.

Freudenberg (trading as Hermann Gerson) to recover a quarter's rent due on September 29, 1914, under a lease made in 1903 of certain premises situate in Prince's Street, Hanover Square, London. The defendant resides and carries on business as a mantle manufacturer in Berlin in the Empire of Germany, and had for some time before the outbreak of war carried on a branch establishment at the above premises by means of an agent named Arthur Barnes. According to the affidavit of the plaintiff, a quantity of stock was usually kept on the premises, but immediately before September 29 the whole of the stock, fixtures, and fittings was removed from the premises. On September 28 the keys of the premises were sent to the plaintiff by Barnes, which the plaintiff intimated would be held at the disposal of Barnes as the agent of the defendant. The plaintiff having issued his writ applied to Scrutton J. for directions as to the manner of serving it upon the defendant in Berlin. The learned judge gave liberty to the plaintiff to issue a concurrent writ against the defendant and to serve notice of the writ in Berlin. In view of the difficulty of serving the notice of writ on the defendant, Mr. Fitch, on behalf of the plaintiff, asked this Court to make an order for substituted service of the notice of writ by allowing service of it upon Barnes or otherwise as the Court might direct.

In the second appeal the plaintiffs Kreglinger are skin and hide merchants carrying on business in London and at Antwerp. Before the outbreak of war they had entered into contracts for the sale of cargoes of hides from Australia to the firm of S. Samuel & Rosenfeld, carrying on business in London. Before the outbreak of war the firm of S. Samuel & Rosenfeld intimated that they did not intend to carry out the contracts. After the outbreak of war a writ was issued and the plaintiffs claimed to have effected proper service of it upon the firm by leaving it upon one Bonome, a person who appeared to be in control or management of the business here. (See Order XLVIIIA, r. 3.) Bonome entered a conditional appearance and applied to set aside the service. Scrutton J. set it aside on the ground that one Alfred Cohen, who resided at Hamburg, was the sole proprietor of the business of S. Samuel & Rosenfeld, and therefore Order XLVIIIA, r. 3, did not apply, as there were not two or

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more partners carrying on business within the jurisdiction. An unsuccessful attempt was made to establish that Bonome was a partner in the firm. Evidence was taken before the Master, and it appeared that Bonome was not a partner, but was the manager of the business in London for Alfred Cohen with full authority to act in all matters in respect of the said business. The plaintiffs only knew Bonome and transacted all their business with the firm with him. Scrutton J. in the plaintiffs' application gave leave to issue a concurrent writ against Alfred Cohen with liberty to serve notice of the writ at Hamburg in Germany, but refused leave to make substituted service of the notice of writ by serving it on Bonome, thinking himself bound to refuse by reason of the decision in *Wilding* v. *Bean*. (1) The plaintiffs appeal from this refusal and ask this Court, in view of the circumstances and of the difficulty, if not impossibility as they suggest, of effecting service upon Alfred Cohen during the war, to permit them to make the service upon Bonome, inasmuch as he appears to be the person in charge of the defendants' interests in this country. We are at this moment engaged only in determining questions as to the proper mode of service, and are expressing no opinion, except in this connection, as to the position of Bonome.

The Courts having decided that the alien enemy can be sued, have to consider how effective notice of the proceedings in the Courts of this country can be served on the alien enemy in the enemy country. Diplomatic relations between the two nations have been broken off, and a serious question might have arisen whether in these circumstances Order XI., r. 8, of the Rules of the Supreme Court was applicable. Before the outbreak of war Germany was, by order of the Lord Chancellor, a country to which this rule applied, and, so long as that order stood, the procedure to be adopted for service in Germany was regulated by that rule. That order has, however, been revoked by the Lord Chancellor, and it therefore becomes unnecessary further to consider whether the rule that this procedure therein prescribed "*shall* be adopted" could be held applicable during a war between us and the country in which the service was to be effected. Unless an order for substituted service in this country of a notice of writ for

(1) [1891] 1 Q. B. 100.

service out of the jurisdiction can be made in a proper case, great hardship may be inflicted upon persons who are subjects of and resident in this country who have given credit or entered into contractual relations with or have claims against persons who are now alien enemies, to the manifest advantage of the alien enemies and disadvantage of British subjects and subjects of other States who wish to sue in this country. This Court whilst bearing this consideration in mind must also take into account the position of the defendant the alien enemy, who is, according to the fundamental principles of English law, entitled to effective notice of the proceedings against him. It is obvious that in all cases against the alien enemy the plaintiff will seek, if possible, an order to make substituted service in this country. It is desirable therefore to consider in some detail—

(1.) In what circumstances substituted service can be ordered; and

(2.) Whether substituted service within the jurisdiction can be ordered of a notice of writ for service without the jurisdiction.

The general rule is that an order for substituted service of writ of summons within the jurisdiction cannot be made in any case in which, at the time of the issue of the writ, there could not be *at law* a good personal service of the writ because the defendant is not within the jurisdiction.

"If the writ had not been issued until the defendant had left the country, the only way in which the defendant could have been properly served would have been by proceeding under the practice as to writs for service out of the jurisdiction": per Collins L.J. in *Jay* v. *Budd*. (1)

"There cannot be a good substituted service where personal service would not be legally possible": per Lord Esher M.R. and Lopes L.J. in *Worcester City and County Banking Co.* v. *Firbank*. (2) "There cannot be substituted service on a person on whom personal service could not be validly effected": per Davey L.J. (3) See also *Fry* v. *Moore* (4); *In re Urquhart* (5); *Wilding* v. *Bean* (6),

(1) [1898] 1 Q. B. at p. 19.
(2) [1894] 1 Q. B. at pp. 788, 790.
(3) Ibid. at p. 792.
(4) (1889) 23 Q. B. D. 395.
(5) (1890) 24 Q. B. D. 723.
(6) [1891] 1 Q. B. 100.

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especially per Lord Esher M.R. (1) The rule was also acted upon by Farwell J. in *Western, &c., Building Society* v. *Rucklidge.* (2) This general rule is *not* applied where the Court is satisfied that the defendant went outside the jurisdiction *before* the issue of the writ *in order to evade the service of the writ within it:* see *In re Urquhart* (3); *Watt* v. *Barnett.* (4) If the defendant went out of the jurisdiction *after the issue of the writ,* although not for the purpose of evading service, substituted service may be allowed *if the Court is satisfied that the issue of the writ came to his knowledge before he went* outside the jurisdiction and special circumstances show that such substituted service would be just within Order IX., r. 2: see *Jay* v. *Budd* (5), per Lord Halsbury L.C. and Collins L.J., Rigby L.J. dissenting.

In order that substituted service may be permitted, it must be clearly shown that the plaintiff is in fact unable to effect personal service and that the writ is likely to reach the defendant or to come to his knowledge if the method of substituted service which is asked for by the plaintiff is adopted. The Court may then make such order as may seem just: Order IX., r. 2. The terms of this rule are of very wide application, and give a very wide discretion which we are not inclined to limit. In the case of *a writ* properly issued under one of the heads of Order XI., r. 1, for service out of the jurisdiction, substituted service either within or without the jurisdiction may be permitted in special circumstances, as, e.g., that the defendant is evading personal service of such writ, and that the proposed form of substituted service will be effectual in bringing the writ to the defendant's knowledge: *Ford* v. *Shephard* (6); *Western, &c., Building Society* v. *Rucklidge.* (7) In the case of *a notice in lieu of writ* to be served on a foreigner out of the jurisdiction on order properly obtained under Order XI., r. 1, there is no reason why substituted service of that notice should not be permitted in similar circumstances to those in which it is permitted in the case of a writ for service

(1) [1891] 1 Q. B. at foot of p. 101.
(2) Unreported, but see the report of that case before Swinfen Eady J., [1905] 2 Ch. 472.
(3) 24 Q. B. D. 723.
(4) (1878) 3 Q. B. D. 183; C. A. ibid. 363.
(5) [1898] 1 Q. B. 12.
(6) (1895) 34 W. R. 63; 53 L. T. 564.
(7) [1905] 2 Ch. 472.

out of the jurisdiction. As to substituted service of such a notice, Order xi., r. 7, and Order ix., r. 2, give power to order it. Certainly under Order xi., rr. 8 (4.) and 8 (5.), it is contemplated that this may be done, for it prescribes the method of doing it, and *Ditton* v. *Bornemann* (1) (a decision on the practice before the introduction of rr. 8 and 8 (*a*)) favours the view that the substituted service of a notice of a writ may be allowed. Lord Coleridge C.J. and Bowen L.J., sitting as a Divisional Court, made the order, which had been refused by the judge in chambers, that service of the notice of the writ should be made by registered letter to Germany to the trustee of the estate of the defendant, whose affairs were in compulsory liquidation in Germany, and also to the defendant's wife, and that defendant should have a month to appear after letter would arrive. The judge in chambers before whom the application is made for substituted service of a writ for service out of the jurisdiction or of a notice of such a writ ought to be careful before acceding to the application—

(*a*) To satisfy himself that there exists a practical impossibility of actual service, as otherwise, inasmuch as there is always a certain amount of difficulty and delay in effecting service out of the jurisdiction under Order xi., a plaintiff will always seek to obtain an order for substituted service, with the serious risk that the defendant may never have notice of the proceedings and judgment in default of appearance may be given against him unjustly;

(*b*) To satisfy himself for the same reason that the method of substituted service asked for by the plaintiff is one which will in all reasonable probability, if not certainty, be effective to bring knowledge of the writ or the notice of the writ (as the case may be) to the defendant.

Our English procedure has hitherto been laudably superior to the Continental in not permitting that which may be called "constructive service," such as, e.g., by public notices or advertisements, whereby a defendant may be condemned unheard because he has had no knowledge of the proceedings against him. In *Porter* v. *Freudenberg* the writ was issued for service

(1) (1886) 3 Times L. R. 3.

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within the jurisdiction, the defendant being abroad at the time of the issue of the writ. There could therefore be no order for substituted service of that writ. Leave having now been given to issue a concurrent writ and to serve notice out of the jurisdiction, that difficulty is removed. The proper order to make in the circumstances in this case and also in *Kreglinger* v. *S. Samuel & Rosenfeld* is to give the leave to make substituted service and to refer both cases back to chambers for directions as to the mode of effecting it. Upon the materials now before us we think service of the notice should be effected in the one case by substituted service upon Barnes and in the other upon Bonome, and such further terms should be imposed in chambers upon the plaintiff as to advertisement or other means of communication and as to the period to be given to the defendant for appearance as may seem proper.

The Rule Committee may think it necessary now to consider whether further rules should be made to meet some of the present difficulties of service of notice of proceedings in our Courts against an alien enemy. It should, however, be borne in mind that there is little, if any, value in obtaining judgment in our Courts in default of appearance of the defendant resident in an enemy State, unless there is property in this country which can be reached in execution of the judgment. Where there is property in this country there is frequently some person upon whom an order for substituted service could be made supplemented by other provisions as to giving notice to the defendant of the proceedings to which we have already called attention. In each of these appeals the order of Scrutton J. will be varied in accordance with the views we have expressed, and the matters will be referred back to chambers to be there dealt with.

In the third appeal the matter came before us on a motion to set aside the appeal on the ground that the appellants were alien enemies. Soldan & Co., Limited, an English company, presented a petition for revocation of a patent granted to a German subject resident in Germany, of which patent a German company were the owners. The petition was heard by Warrington J., who made an order on July 28, 1914, for revocation of the patent, but, if notice of appeal was given on or before August 28,

1914, the operation of the order was to be suspended until the hearing of the appeal. Notice of appeal was given on August 28. War was declared between His Majesty the King and the German Emperor on August 4. Therefore at the date of giving the notice of appeal the said appellants were alien enemies, and the notice of the motion now before the Court was launched to set aside the notice of appeal upon that ground. At the hearing before us Mr. Walter, on behalf of the petitioners, admitted that he could not succeed on the motion and did not now apply to set aside the appeal, but he did ask the Court to express its opinion that the hearing of the appeal was not suspended and that it could be heard during the war. The position was peculiar, inasmuch as Mr. Moulton, on behalf of the appellants, did not dispute that his clients were alien enemies, but insisted, in the interest of his clients, not upon their right to be heard, but that their appeal could not be heard until after the restoration of peace. If we acceded to that view and the order for suspension of the revocation of the patent stood as made by Warrington J., alien enemies who are the owners of the patent would be in a distinctly advantageous position so long as the war lasted. It is not surprising, therefore, that Mr. Walter, on behalf of the petitioners, insisted that the appeal of the alien enemy could be heard, and asked this Court to give an intimation to that effect. The appellants were the respondents to a petition. They were brought to the Court at the instance of another because they were the owners of the patent rights. The alien enemy appellants were not the "actors" in the proceedings; these were initiated by the petitioners, and notice was served upon the appellants for revocation of the patent rights they had acquired.

The appellants must be regarded for this purpose as being in the same position as a defendant in a suit who appeals from a judgment given against him. In accordance with the opinion we have already expressed, the appellants were therefore entitled not only to appear and be heard on this motion, but to have their appeal heard in the ordinary course notwithstanding the war. We cannot accede to their contention that the hearing of the appeal must be suspended during the war. We take a more favourable view of the appellants' rights in this respect than the

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appellants, and we agree with Mr. Walter's contention that the appeal must take and keep its place in the ordinary way in the list. It should be distinctly understood that nothing that we have said is intended in any degree to interfere with or limit the discretion of the Court before which the appeal will come for hearing to make any such order for postponement or otherwise of this appeal as it may think fit. The appellants can make any such application based upon the difficulties arising from the war as they may deem right and necessary, and the Court will deal with it upon the facts then presented in the usual way.

The motion must be dismissed, but, in view of the peculiar circumstances, without costs.

The late Kennedy L.J. had approved this judgment before his death.

This is the judgment of the Court.

Order varied in Porter *v.* Freudenberg *and in* Kreglinger *v.* S. Samuel & Rosenfeld.
Motion dismissed in In re Merten's Patents.

Solicitors for plaintiff in *Porter* v. *Freudenberg : W. W. Young, Son & Ward.*

Solicitors for plaintiffs in *Kreglinger* v. *S. Samuel & Rosenfeld : Alfred Double & Sons.*

Solicitors for petitioners in *In re Merten's Patents : Bower, Cotton & Bower.*

Solicitors for respondents in *In re Merten's Patents : White & Leonard.*

W. J. B.

[IN THE COURT OF APPEAL.]

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CONTINENTAL TYRE AND RUBBER COMPANY (GREAT BRITAIN), LIMITED *v.* DAIMLER COMPANY, LIMITED.

THE SAME *v.* THOMAS TILLING, LIMITED.

Alien Enemy—Limited Liability Company registered in England—Share Capital held by Alien Enemies—Right to sue.

The plaintiff company was incorporated in England and carried on business at their registered offices in London. It had a capital of 25,000*l.* in 1*l.* shares. It was formed as a subsidiary company by a German company to promote the sale in the United Kingdom of tyres made in Germany by the German company. All its directors were German subjects resident in Germany, and the whole of its shares (except one) were held by German subjects residing in Germany:—

Held by Lord Reading, C.J., Lord Cozens-Hardy M.R., Kennedy L.J., Phillimore L.J., and Pickford L.J. (Buckley L.J. dissenting), that the company did not change its character of an English company because on the outbreak of war all the shareholders and directors resided in an alien enemy country and became alien enemies; that once a corporation has been created in accordance with the requirements of the law it is an English company notwithstanding that all its shareholders may be aliens; that payment of a debt to the plaintiff company was not a payment to the alien enemy shareholders or for their benefit, and that the right of the plaintiff company to recover in an action brought to recover a debt due to them was therefore not affected by the fact that practically the whole of the shares were held by alien enemies.

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APPEAL of the defendants from an order of Scrutton J. at chambers affirming an order of a Master by which leave was given to the plaintiffs to sign final judgment under Order XIV.

The plaintiffs were a limited liability company incorporated under the Companies Acts. They carried on business in London at the registered offices of the company and had a number of agencies throughout the United Kingdom. The company was formed in 1905 with a capital of 10,000*l.*, increased in 1908 to 25,000*l.*, to trade in motor car tyres made in Germany by a company incorporated in that country under German law. The

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German company formed a number of subsidiary companies in various parts of the world for the sale of these tyres. The plaintiff company was formed for the purpose of selling such tyres in the United Kingdom. At the date of the writ the German company held 23,398 shares in the plaintiff company, and the remaining shares (except one) were held by subjects of the German Empire residing in Germany. The one share was registered in the name of the secretary of the company, who was born in Germany, resided in London, and, in 1910, became a naturalized subject of the Crown. The directors were subjects of the German Empire and were resident in Germany. The business was managed by two managers and a secretary, all of whom were resident in this country.

The plaintiff company was the drawer and holder of bills accepted by the defendants for goods supplied before the declaration of war. The bills matured for payment and were presented after the declaration of war. It was admitted by the defendants that the goods had been delivered and that payment for them was due, but they resisted payment on the ground that the plaintiff company was not entitled to receive, and could not enforce, payment of the debt; they contended that the plaintiff company must be regarded as an alien enemy and that, as commercial intercourse between persons under the protection of the Crown and persons who are alien enemies is illegal, payment to the plaintiff company must be illegal.

Upon a summons taken out by the plaintiffs under Order XIV. for leave to sign final judgment, a Master gave leave, and his order was affirmed by Scrutton J.

The defendants appealed.

Gore-Browne, K.C. (*H. Maddocks* with him), for the defendants. There is no authority as to the position of alien enemy shareholders in a British company on the outbreak of war. It is admitted that aliens may form a company in this country under the Companies Acts: *In re General Company for the Promotion of Land Credit* (1), and in the House of Lords sub nom. *Princess of Reuss* v. *Bos.* (2) "The legal entity created by

(1) (1870) L. R. 5 Ch. 363. (2) (1871) L. R. 5 H. L. 176.

registration is a corporate body distinct from the persons composing it": Buckley on Companies, 9th ed., p. 27 (note to s. 16 of the Companies (Consolidation) Act, 1908). The company, when incorporated, is a person independent of its shareholders: *Janson* v. *Driefontein Consolidated Mines.* (1) The plaintiff company is therefore a valid company. The main proposition contended for is that, though the company is a good British company, under the doctrine of non-intercourse between nationals and alien enemies the Court will look at the substance and disregard the form, and if it finds that in substance, though not in form, the dealing is with an alien enemy, the Court will say that payment on account of that dealing is prohibited during war. A further point is that, inasmuch as all the directors and all the shareholders, except one, are alien enemies, there is no one who can instruct a solicitor to bring an action. The directors upon the outbreak of war ceased to be directors, and as the shareholders are alien enemies they cannot exercise their functions as corporators during the war and cannot therefore appoint new directors during the war to instruct a solicitor. The rights of the shareholders are suspended during the war.

With regard to the main point, it is stated in Lindley on Companies, 6th ed., p. 53, that "alien enemies stand in a very different position from alien friends. . . . . The effect of a person who is a member of a company becoming an alien enemy by a declaration of war has never been decided; but *Ex parte Boussmaker* (2) tends to show that such a person would not ipso facto cease to be a member, but rather that his rights and liabilities would be suspended during the war and might be enforced on restoration of peace." And at p. 54 it is said that a registered company does not necessarily dwell where its registered office is situate. In Westlake's International Law, Part II., "War," at pp. 49, 50, when dealing with the doctrine of non-intercourse during war, it is said that shares and debentures of companies incorporated under British law which are held by enemy subjects at the outbreak of war will not cease to exist, but the dividends and interest will not be paid during the war;

(1) [1902] A. C. 484, at p. 497. (2) (1806) 13 Ves. 71.

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and the prohibition of commercial intercourse will prevent the shareholders from exercising voting powers, and the enemy directors must be regarded as deprived of that character from the outbreak of war. In Cobbett's Leading Cases on International Law, Part II., "War," at p. 89, it is said that "a corporation is itself a juristic person, and as such takes its character in war, as friendly or hostile, in general from its domicile, irrespective of the nationality of its directors or shareholders," and that on war breaking out enemy directors would ipso facto vacate their seats, and enemy shareholders would retain their shares as property, the right to receive dividends being suspended during the war. That is the position of the shareholders and directors. During war the business of a company in the position of the plaintiffs cannot be carried on. Notices of meetings cannot be served in Germany. Intercourse by letter in a business matter is prohibited. The doctrine of non-intercourse does not depend upon whether the transaction will enrich the enemy. There must be no commercial dealings with the enemy nor any communication with him on a business matter which is in the nature of trading with the enemy. There must be no commercial intercourse: Westlake's International Law, Part II., p. 48, note 2. There must be no communication on a matter of business; no inviting of the enemy to take part in trade here by acting as shareholders in the company. It would be most dangerous that enemy shareholders in an armament company should be allowed to influence its management. The question of commercial intercourse must be determined either under the common law or under the Trading with the Enemy Act, 1914 (4 & 5 Geo. 5, c. 87). Sect. 3 of that Act contemplates that the constitution of a British company may be such that it could not carry on its business in this country by its directors and shareholders, but that it is in the public interest that the business should continue to be carried on, and in such a case it gives the Board of Trade power to appoint a controller to carry on the business. That has not been done here, but an inspector has been appointed under s. 2, sub-s. 2 (*b*). The Trading with the Enemy Proclamation, No. 2, dated September 9, 1914, recites that it is "contrary to law for any person resident, carrying on business, or being in our

Dominions, to trade or have any commercial or financial transactions with any person resident or carrying on business in the German Empire or Austria-Hungary without our permission." The offence of trading with the enemy is not got rid of by appointing an agent for an alien enemy. Where practically all the shareholders are alien enemies, trading with the company is trading with the enemy. The Court ought for this purpose to go behind the constitution of the company. It does not follow that an English company with alien enemy shareholders cannot trade here; s. 2, sub-s. 2 (*b*), of the Trading with the Enemy Act, 1914, shows that it can. But it cannot do so where substantially all its shareholders are alien enemies. Paragraphs 3 and 5 of the Proclamation apply. The Court will look behind the form of the transaction and will have regard to its substance and to the facts of the case. At common law there must be no trading with the enemy, whether it is done directly or through the technical entity of a company all, or practically all, of whose shareholders are alien enemies. The alien enemy shareholders are clothed in the dress of an incorporated company, but the enemy shareholders are the real "persona" carrying on the business. A dealing with such a company is in substance a dealing with alien enemies, the enemy directors managing the business for the alien enemy shareholders. Suppose that an alien enemy carried on business here through a British trustee, a trading with the trustee would be a trading with the enemy. The appointment of an inspector under s. 2, sub-s. 2, of the Trading with the Enemy Act, 1914, does not give a licence to an alien enemy to trade under paragraph 8 of the Proclamation. The Act has not made that lawful which was unlawful at common law. That sub-section applies to persons who are not, as well as to persons who are, alien enemies. The plaintiff company, being in substance an alien enemy, cannot sue. If the company can recover the debt, it will enure for the benefit of the alien enemy shareholders, who can raise money on it. Sect. 2, sub-s. 2 (*b*), of the Act assumes that the company is a lawful entity, but it does not say that it shall have a licence to trade. The company is suing on behalf of its shareholders who are alien enemies, and that is forbidden. This is a question of

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public policy, and different considerations arise from those under discussion in *Salomon* v. *Salomon & Co.* (1)

Next, the office of director became ipso facto vacated on the outbreak of war. There were no persons who could act for the company, and the company could only act in general meeting. That is impossible, because all the shareholders are alien enemies, and the company cannot hold a general meeting outside the jurisdiction. To allow a meeting to be held here, even if the necessary notices could be served on the enemy shareholders resident in Germany, would be to allow commercial intercourse with the enemy. Where, as here under article 102 of the articles of association of the company, the directors are entrusted with the management of the business of the company, the company cannot manage the business: *Automatic Self-cleansing Filter Syndicate Co.* v. *Cuninghame* (2); *Quin & Axtens* v. *Salmon* (3); *Gramophone and Typewriter* v. *Stanley.* (4) By clause 17 of article 102 the management of the company includes the bringing of actions. War dissolves all contracts which involve trading with the enemy: *Janson* v. *Driefontein Consolidated Mines.* (5) Trade and dealing with the enemy are forbidden, and contracts which cannot be performed without dealing with the enemy are dissolved: *Esposito* v. *Bowden.* (6) The contract of the directors is to serve and have control of the company; war has supervened and avoided that contract. It is not like a contract which has been executed and for which payment alone remains to be made. In the latter case the contract is suspended during war. The directors alone can bring an action for the company, and new directors cannot be appointed because the shareholders are alien enemies. The plaintiff company is therefore not entitled to maintain this action.

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Appeal of the defendants from a judgment in favour of the plaintiffs at the trial of the action before Lush J.

(1) [1897] A. C. 22.
(2) [1906] 2 Ch. 34.
(3) [1909] 1 Ch. 311; [1909] A. C. 442.
(4) [1908] 2 K. B. 89, at p. 105.
(5) [1902] A. C. 484, at p. 509.
(6) (1857) 7 E. & B. 763, at pp. 781, 793, 794.

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The plaintiffs' claim was for the balance of an account for goods supplied before the war. It was admitted that the goods (except as to a small amount) had been delivered and that payment for them was due; but payment was resisted on the same grounds as in the action against the Daimler Company. Judgment was given at the trial by Lush J. for the plaintiffs. The defendants appealed.

Leslie Scott, K.C., and *H. Maddocks*, for the defendants. In the first place, the plaintiff company must on the facts be regarded as an alien enemy. Alternatively, if the company is not an alien enemy, payment to the company would be for the benefit of alien enemies, and would therefore be illegal both at common law and by reason of the Trading with the Enemy Proclamation, No. 2. Thirdly, the plaintiff company had no power to initiate this action. Dealing first with the third proposition, it is based upon three grounds. The contract between the company and the directors was dissolved on the outbreak of war, and thereupon the directors ceased to be directors; the shareholders' contracts of membership in the company were suspended during the war; consequently, where all the directors and substantially all the shareholders of the company are alien enemies, the plaintiff company as a personality is paralysed by the outbreak of war, so that it cannot do anything during the war. The company is struck with inactivity. *Ex parte Boussmaker* (1) shows that war does not operate to confiscate an enemy's private property. All trading negotiation, communication, or intercourse with the enemy ceases: *Griswold* v. *Waddington*. (2) [He also referred to *Esposito* v. *Bowden* (3); *Clemontson* v. *Blessig*. (4)]

With regard to the main proposition, the distinction between this case and *Salomon* v. *Salomon & Co.* (5) is this: the common law administered during war regards the natural person, the person who acts, and not the technical person. Upon war breaking out every subject of the King is at war with every enemy subject, except when the enemy subjects throw in their

(1) 13 Ves. 71.

(2) (1819) 16 Johnson, Sup. Ct. N. Y. 438.

(3) 7 E. & B. 763, at p. 782.

(4) (1855) 11 Ex. 135, note at p. 141.

(5) [1897] A. C. 22.

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lot with this country by residing here and vice versa. A corporation is not an enemy or a subject; individuals are. The object of forbidding intercourse with the enemy is to hurt the enemy and to bring economic pressure upon him. Following that out, it is impossible to pay money to this company without benefiting an alien enemy. In the present case no question arises as to what would happen where a proportion of the shareholders were British subjects; here they are substantially all alien enemies. The law relating to intercourse with an enemy is a branch of the law relating to public policy. [He also cited *Potts* v. *Bell* (1); *The Emulous* (2); *The Tommi* (3); *The Rapid* (4); *The Julia* (5); *Society for Propagation of the Gospel* v. *Wheeler* (6); *Bank of United States* v. *Deveaux*. (7)]

J. H. M. Campbell, K.C., and *Douglas Hogg*, for the plaintiffs. (8) The real question in these cases is whether the plaintiff company is a British company. It is submitted that it is a British company for all intents and purposes in peace and war. The defendants admit that it is a British company in time of peace but say that in time of war they are not to be barred by technicality from showing its German constitution; that proposition is devoid of authority. The status of the plaintiff company remains unaffected by a state of war. In no recognized authority on international law is there any suggestion to the effect of the defendants' contention. A company is an entity entirely apart from the quality or nationality of its shareholders: Buckley on Companies 9th ed., p. 4. The case of *Gramophone and Typewriter Co.* v. *Stanley* (9) is conclusive to show that even though the whole capital is absorbed by one individual or by one set of shareholders the question is whether its place of business and its offices are in this country. *Amorduct Co.* v. *Defries* (10) is an authority that the position of such a company is not altered in time of war. The cases of *Daniel* v. *Commissioners*

(1) (1800) 8 T. R. 548.
(2) (1813) 1 Gallison (U.S.) 563.
(3) [1914] P. 251.
(4) (1812) 1 Gallison (U.S.) 295; 8 Cranch, 155.
(5) (1813) 1 Gallison (U.S.) 594, 603.
(6) (1814) 2 Gallison (U.S.) 105.
(7) (1809) 5 Cranch, 61, at pp. 84, 86.
(8) They appeared for the plaintiffs in both actions.
(9) [1908] 2 K. B. 89.
(10) (1914) 31 Times L. R. 69.

for Claims on France (1) and *Long* v. *Commissioners for Claims on France* (2) are indistinguishable from the present case, of which they are the converse. The former was a case in which the Irish owners of a religious institution in France applied to the commissioners for compensation for injury to their premises; their claim was rejected by the Board of Claims and came before the Privy Council. The point was the character of the establishment and the decision shows that regard is not paid to the individual members of a company more in time of war than in peace. [He also referred to *Janson* v. *Driefontein Consolidated Mines*. (3)]

Phillimore in his treatise on International Law, vol. 3, when discussing the case of *Society for Propagation of the Gospel* v. *Wheeler* (4), entirely disputes the proposition that at the outbreak of war subjects are bound to return to their own countries. As to an implied authority in the plaintiff company to carry on this trade, the evidence of licence by implication is overwhelming.

Gore-Browne, K.C., in reply.

1915. Jan. 19. The following judgment of the majority of the COURT (Lord Reading C.J., Lord Cozens-Hardy M.R., Kennedy L.J., Phillimore L.J., and Pickford L.J.; Buckley L.J. dissenting) was read by

LORD READING C.J. These two actions are brought for the purpose of determining whether during the war payment of a debt can be enforced by a company of which all the shareholders and directors are alien enemies. In the first action Scrutton J. affirmed the order of the Master giving leave to sign final judgment under Order XIV. In the second, the action was tried before Lush J., who decided in favour of the plaintiff company. The present appeals are against both judgments and by consent were heard together. They have been ably and elaborately argued and raise points of considerable importance.

The plaintiffs are a limited liability company incorporated under the Companies Acts. They carry on business in London at the registered office of the company and have a number of

(1) (1825) 2 Knapp, P. C. 23.
(2) (1825) 2 Knapp, P. C. 51.
(3) [1902] A. C. 484.
(4) 2 Gallison (U.S.) 105.

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agencies throughout the United Kingdom. The company was formed in 1905 with a capital of 10,000*l.*, increased in 1908 to 25,000*l.*, to trade in motor car tyres made in Germany by a company incorporated under German law. The German company formed a number of subsidiary companies in various parts of the world for the sale of these tyres. The plaintiff company was formed for the purpose of selling such tyres in the United Kingdom. At the date of the writ the German company held 23,398 shares in the plaintiff company, and the remaining shares (except one) are now held by subjects of the German Empire residing in Germany. The one share is registered in the name of the secretary of the company, who was born in Germany, resided in London, and in January, 1910, became a naturalized subject of the Crown. The directors are subjects of the German Empire and are resident in Germany. The business is managed according to the evidence of the secretary by two managers and himself, all three being resident in this country.

In the first case the plaintiff company is the drawer and holder of bills accepted by the defendants for goods supplied before the declaration of war. The bills matured for payment and were presented after the declaration of war. In the second case the plaintiffs' claim is for a balance of account for goods supplied before the war. It is admitted by both defendants (except as to a small amount in the second action) that the goods have been delivered and that payment for them is due, but both defendants have resisted payment on the ground that in the circumstances above stated the plaintiff company was not entitled to receive and could not enforce payment of the debt. The appellants contend that the plaintiff company must be regarded as an alien enemy notwithstanding that it is a limited liability company, and that as commercial intercourse between persons under the protection of the Crown and persons who are alien enemies is illegal, payment to the plaintiff company must be illegal. They further contend that the Court should look at the substance and not the technicalities of the matter. If the plaintiff company is to be regarded as an alien enemy the payment would be illegal under the common law and also under paragraph 5, sub-paragraph 1, of the Royal Proclamation relating to Trading with the

Enemy issued on September 9, 1914, which forbids payment to or for the benefit of an alien enemy, and is a Proclamation in force within s. 1, sub-s. 2, of the Trading with the Enemy Act, 1914. The appellants further contend that the directors, having become alien enemies at the outbreak of the war, ceased to be directors of the company, and that as no other directors had been appointed no authority had been or could be given to bring these actions. These contentions require careful consideration.

It cannot be disputed that the plaintiff company is an entity created by statute. It is a company incorporated under the Companies Acts and therefore is a thing brought into existence by virtue of statutory enactment. At the outbreak of war it was carrying on business in the United Kingdom; it had contracted to supply goods, it delivered them, and until the outbreak of the war it was admittedly entitled to receive payment at the due dates. Has the character of the company changed because on the outbreak of war all the shareholders and directors resided in an enemy country and therefore became alien enemies? Admittedly it was an English company before the war. An English company cannot by reason of these facts cease to be an English company. It remains an English company regardless of the residence of its shareholders or directors either before or after the declaration of war. Indeed it was not argued by Mr. Gore-Browne that the company ceased to be an entity created under English law, but it was argued that the law in time of war and in reference to trading with the enemy should sweep aside this "technicality" as the entity was described and should treat the company not as an English company but as a German company and therefore as an alien enemy. If the creation and existence of the company could be treated as a mere technicality, there would be considerable force in this argument. It is undoubtedly the policy of the law as administered in our Courts of justice to regard substance and to disregard form. Justice should not be hindered by mere technicality, but substance must not be treated as form or swept aside as technicality because that course might appear convenient in a particular case. The fallacy of the appellants' contention lies in the suggestion that the entity created by statute is or can be treated

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during the war as a mere form or technicality by reason of the enemy character of its shareholders and directors. A company formed and registered under the Companies Acts has a real existence with rights and liabilities as a separate legal entity. It is a different person altogether from the subscribers to the memorandum or the shareholders on the register (per Lord Macnaghten in *Salomon* v. *Salomon & Co.* (1)) It cannot be technically an English company and substantially a German company except by the use of inaccurate and misleading language. Once it is validly constituted as an English company it is an artificial creation of the Legislature and it retains its existence for all intents and purposes. It is a living thing with a separate existence which cannot be swept aside as a technicality. It is not a mere name or mask or cloak or device to conceal the identity of persons and it is not suggested that the company was formed for any dishonest or fraudulent purpose. It is a legal body clothed with the form prescribed by the Legislature.

In determining whether a company is an English or foreign corporation no inquiry is made into the share register for the purpose of ascertaining whether the members of the company are English or foreign. Once a corporation has been created in accordance with the requirements of the law it is an English company notwithstanding that all its shareholders may be foreign. Just as a foreign corporation does not become British and cease to be foreign if all its members are subjects of the British Crown (per Lord Macnaghten, Lord Brampton, and Lord Lindley in *Janson* v. *Driefontein Consolidated Mines* (2)). For the appellants' contention to succeed payment to the company must be treated as payment to the shareholders of the company, but a debt due to a company is not a debt due to all or any of its shareholders: *Salomon* v. *Salomon & Co.* (3) The company and the company alone is the creditor entitled to enforce payment of the debt and empowered to give to the debtor a good and valid discharge. Once this conclusion is reached it follows that payment to the plaintiff company is not payment to the alien enemy shareholders or for their benefit.

(1) [1897] A. C. 22, at p. 51.
(2) [1902] A. C. 484, at pp. 497, 501, and 505.
(3) [1897] A. C. 22.

The same result is arrived at under paragraph 3 of the above mentioned Proclamation. It defines "enemy" in paragraph 3. "The expression 'enemy' in this Proclamation means any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country. In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country."

Therefore although payment is forbidden "to or for the benefit of an enemy" this prohibition does not apply when payment is made to a company incorporated in this country. Under this Proclamation it appears clear that the test of residence or place of carrying on business to determine whether an incorporated body was enemy or not is not to be applied. The company only becomes enemy if incorporated in the enemy country, and as the plaintiff company was not incorporated in the enemy country, enemy character does not attach to it. Further it is provided by s. 1, sub-s. 2, of the Trading with the Enemy Act, 1914, that any transaction permitted by or under any Proclamation issued by His Majesty dealing with trading with the enemy shall not be deemed to be trading with the enemy. As by the Proclamation enemy character attaches only to those incorporated in a foreign country it follows that payment to a company incorporated in this country is not only not forbidden, but is in our opinion impliedly permitted. (Both in the Proclamation and the statutes relating to trading with the enemy the adjective "alien" is not used, doubtless because it was thought superfluous when once "enemy" had been defined.)

It must, however, be clearly understood that any person who on behalf of the plaintiff company paid money to shareholders resident or carrying on business in Germany or to a company incorporated in Germany would be acting in defiance of the law, and none the less because payment is made in the name of the company. That would be a criminal offence and would be within the express prohibition of paragraph 5, sub-paragraph 1, as defined by paragraph 3. The plaintiff company has never claimed any such right and has explicitly disclaimed any such

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intention. According to the evidence money received is paid into the plaintiffs' banking account and 9000*l.* per month is drawn out and paid into another account of the plaintiff company at the bank for the purpose of meeting expenses and establishment charges throughout the United Kingdom; the remainder of the money received is left to accumulate in the bank.

It is to be observed that if payment to a company would be payment "to or for the benefit of an enemy" because all the shareholders are enemies and because payment to the company must be regarded as payment to the shareholders it would seem to follow that payment of a debt to a company which had some enemy shareholders would equally come within the forbidden area. The appellants' answer is that their contention extends at most to those companies in which enemy shareholders are in the majority and in such circumstances as would lead to the conclusion of fact that substantially the company is enemy. Further if this contention were rejected it is urged that when as in the present case all the shareholders and directors are enemies there is no room for doubt as to the fact and a decision in the appellants' favour could be confined to the special facts. There does not appear to be any logical ground for these distinctions. If it were permissible to look behind the existence of the entity and to regard the character of the individual shareholders in order to determine whether or not the payment is "to or for the benefit of an enemy" the suggested line of demarcation would be wholly arbitrary. If payment to a company with a majority of enemy shareholders is to be regarded as payment to an enemy company, what is the position of the other shareholders? Can it be suggested that the minority consisting of British or neutral shareholders cease to be shareholders in an English company and become members of an enemy corporation?

There is no judicial authority for the proposition of the appellants and indeed there is a weight of judicial opinion against it. (See *Salomon* v. *Salomon & Co.*(1) and *Janson* v. *Driefontein Consolidated Mines.*(2)) *Gramophone and Typewriter* v. *Stanley* (3) is a recent instance of the refusal of the Court to treat the entity

(1) [1897] A. C. 22. (2) [1902] A. C. 484.
(3) [1908] 2 K. B 89.

of a company as a mere form or technicality. The Commissioners of Inland Revenue sought to make the Gramophone Company, which was an English company, liable to pay income tax in respect of profits made by a German company in which the English company held all the shares. None of such profits had been received by the English company in this country, but it was sought to treat the profits of the German company for the purpose of income tax as if they were the profits of the English company. The Court of Appeal was of opinion that the business of the German company had not become the business of the English company. Notwithstanding that the English company held all the shares in the German company, the English company could not be treated as having any right to the undistributed profits of the German company. A fortiori it could not have any right to the payment of a debt due to the German company. See also *Kodak* v. *Clark*. (1)

The argument of the appellants that, although the plaintiff company was an English company in times of peace, it could not be so regarded in time of war was further supported by Mr. Leslie Scott on the ground that the plaintiff company could not be regarded as a subject of the Crown. He said the company could not be a subject, it had no mind, it could not be loyal or disloyal to the State. He urged that alone the character of the shareholders must determine whose subject the plaintiff company is, and that when all the shareholders are enemy the plaintiff company is enemy. This point was discussed in *Janson* v. *Driefontein Consolidated Mines*. (2) The litigation arose out of the South African war. The respondent corporation was formed and registered in the Transvaal Republic; most of the shareholders were resident outside the Republic, and were not subjects of it. The appellant, an underwriter and a British subject, objected that the corporation was alien enemy and could not sue. It was argued for the respondents that the corporation should not be regarded as subject to the laws of the Transvaal and as alien enemy. None of their Lordships favoured that view. Some of their Lordships assumed for the purpose of

(1) [1902] 2 K. B. 450; [1903] 1 K. B. 505.
(2) [1902] A. C. 484.

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the case, but did not decide, that the company remained an alien enemy notwithstanding that most of the shareholders were not alien enemies (see Lord Halsbury, p. 490, Lord Macnaghten, p. 497, and possibly Lord Davey only assumed it, p. 498). Lord Lindley (p. 505) was of opinion that the company must be regarded as resident and carrying on business in the Transvaal and subject to the laws of that country, and he added: "When war broke out the company became an alien enemy of this country: see the American case of *Society for the Propagation of the Gospel* v. *Wheeler*. (1) If it becomes material to attribute nationality to the company it would, in my opinion, be correct to say that the company was a Transvaal company and a subject of the Transvaal Government, although almost all its shareholders were foreigners resident elsewhere and subjects of other countries." Lord Brampton, at p. 501, said: "The company clearly must be treated as a subject of the Republic, notwithstanding the nationality of its shareholders." These opinions are not to be taken as part of the actual decision, nevertheless they are opinions of great weight. In *Daniel* v. *The Award of the Commissioners for Liquidating British Claims on France* (2) and in *Long* v. *the Same* (3) it was held by the Privy Council that a corporation of British subjects existing in a foreign country and under control of a foreign Government must be considered as a foreign corporation, and was, therefore, not entitled to claim compensation under a treaty giving this right to British subjects. The corporation was the subject of the foreign State, and not of the British Crown. Even in reference to the ownership of a ship it was held in *The Queen on the Prosecution of the Pacific Steam Navigation Company* v. *Arnaud and Powell* (4) that, notwithstanding that some of the members of the corporation were not British subjects but foreigners, the British corporation was the sole owner of the ship and a British subject. None of these authorities lend support to the appellants' argument; they tend rather to assist the plaintiffs' case.

There remains, however, the case decided in 1809, *Bank of*

(1) 2 Gallison (U.S.) 105.
(2) 2 Knapp, P. C. 23.
(3) 2 Knapp, P. C. 51.
(4) (1846) 16 L. J. (Q.B.) 50.

the United States v. *Deveaux* (1), upon which much reliance was placed by Mr. Leslie Scott. The Supreme Court of the United States there decided that the Court could look beyond the corporate name and notice the character of the individuals who composed the corporation and treat them substantially as parties to the controversy. The question at issue arose from a peculiarity of the Constitution of the United States. The State Courts alone have jurisdiction to try all civil actions except in certain cases reserved by the Constitution and the Judiciary Law to the Federal Courts. One of these reserved cases is where a citizen of one State sues a citizen of another. A suit having been brought in the Federal Court in the corporate name of the bank, it was held by the Supreme Court that a corporation aggregate cannot in its corporate capacity be a citizen, and, therefore, had no right of access to the Federal Court, though it was incorporated in and by one State and was suing the citizen of another State. However, Marshall C.J., who delivered the opinion of the Court, held that, although the corporation could not be a citizen, the Court could look behind the corporate name to ascertain the individuals composing it, so as to determine whether they were citizens of one State suing the citizens of another. The learned Chief Justice based his judgment upon *City of London* v. *Wood* (2), which he treated as an authority for his decision that the Court could look behind the corporate name. Upon an examination of that case, and notwithstanding the high authority of the learned Chief Justice, it does not support so sweeping a proposition. It was a case of a very special character. An action was brought by the Mayor and Commonalty of the City of London in the Court of the Mayor and Aldermen of London. Objection was taken that the Mayor, who was the head of the City, without whom the City had no ability or capacity to sue, was also the very person before whom the action was brought for trial. The Court of King's Bench naturally shrank from upholding a judgment given under such circumstances, and held that the objection was fatal, upon the principle that a judge must not be an interested party in the suit before him. A person cannot be both party and judge in the same suit. The familiar instance

(1) 5 Cranch, 61.

(2) (1701) 12 Mod. 669.

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is that of a judge who is a shareholder in a railway company sued for damages. It is the judge's duty to declare his interest to the parties, and unless they agree to waive any objection he cannot try the case. The absence of such declaration and assent of the parties is the explanation of this case. It is to be observed that in the decisions of our Courts this case has not been relied upon, and certainly has not been followed, as an authority for any such proposition as was argued before us.

Since the argument an examination of American authorities has disclosed that the case of *Bank of the United States* v. *Deveaux* (1) has not since its decision found favour in the Supreme Court of the United States. In 1844, in the case of *Louisville Railroad Co.* v. *Letson* (2), the Supreme Court thought that that case had gone too far, and held that "a corporation created by a State to perform its functions under the authority of that State and only suable there, though it may have members out of the State, seems to us to be a person, though an artificial one, inhabiting and belonging to that State, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that State. We remark too that the cases of Strawbridge and Curtis and the Bank and Deveaux have never been satisfactory to the Bar, and that they were not, especially the last, entirely satisfactory to the Court that made them. They have been followed always most reluctantly and with dissatisfaction. By no one was the correctness of them more questioned than by the late Chief Justice who gave them. It is within the knowledge of several of us that he repeatedly expressed regret that those decisions had been made, adding, whenever the subject was mentioned, that if the point of jurisdiction was an original one, the conclusion would be different. We think we may safely assert that a majority of the members of this Court have at all time partaken of the same regret, and that whenever a case has occurred on the circuit involving the application of the case of the Bank and Deveaux it was yielded to, because the decision had been made, and not because it was thought to be right." In 1895, in the case of *St. Louis and*

(1) 5 Cranch, 61. (2) (1844) 2 Howard 497, at p. 555.

San Francisco Railway v. *James* (1), the Supreme Court again approved the view that the Bank and Deveaux had gone too far, and held that there was an indisputable legal presumption that a corporation is composed of citizens of the State which created it and that presumption of citizenship is one of law not to be defeated by evidence to the contrary. Although not binding upon us, the decision of Marshall C.J. and of the Supreme Court is entitled to our very high respect, and this has caused us to give our most careful consideration to this judgment. It is satisfactory to find in the result that the law of the United States is that the corporation is regarded as a citizen of the State in which it is created, and is, therefore, not in conflict but in harmony with our law.

It was further contended on behalf of the appellants that such technicalities have not been allowed to bind the decisions of the Prize Court, and the case of *The Tommi* (2) was cited. The President there said: "The decision as to when property passes is often very difficult when dealing with municipal law. It depends upon fine technicalities; but the like technicalities have not been allowed to bind the decisions of the Prize Courts when transfers of property are attempted when war is actual or imminent. They have been treated as gossamer, which can be wiped entirely aside, because the Prize Court regards the essential qualities of a transaction, and tries to arrive at the realities of the case. . . . ." It is sufficient for the purpose of this case to say that in this Court we are administering the municipal law and must follow it. In the later case of *The Roumanian* (3), decided on December 7, 1914, a point more closely resembling that in these appeals came before the President. It was a claim to resist condemnation of the cargo ex the vessel on the ground that the owner of the cargo, the Europäische Petroleum Union, though a company incorporated at Bremen under the laws of the Empire of Germany, was in substance and reality a company owned and controlled by companies or firms in allied or neutral countries. In fact only 10 per cent. of the shareholders of the company were alien

(1) (1896) 161 U. S. 545. (2) [1914] P. 251.
(3) [1915] P. 26.

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enemies, the other 90 per cent. being allies or neutrals. The learned President in giving judgment says: "Neutral bodies and subjects are shareholders to a considerable extent in this company. It is a corporate body duly incorporated under the laws of Germany and as such entered an appearance in these proceedings. There was some discussion in argument as to its constitution, but it was not really denied that it was a German company. It clearly is." The owner of the cargo of oil being therefore an enemy company, the decree for condemnation was made and the German company's claim failed. The decision in *The Roumanian* (1) shows that the character of the entity and not of the shareholders was regarded. That is in accordance with the municipal law and is unfavourable to the appellants' argument before us.

Lastly we were invited to decide against the plaintiff company on the ground that to allow it to recover debts during the war would be against public policy. A somewhat similar argument was addressed to the House of Lords in *Janson* v. *Driefontein Consolidated Mines* (2), but it found no favour with any of their Lordships. If the law on this subject had hitherto been in doubt, which it was not, it was firmly and finally settled in that case. Nothing would more easily tend to create uncertainty and confusion in our law than to allow considerations of public policy as distinguished from law based upon public policy to be a ground of judicial decision: see *Janson* v. *Driefontein Consolidated Mines.* (3) The law is admirably laid down by Parke B. in *Egerton* v. *Lord Brownlow and Others* (4) and quoted by Lord Halsbury in *Janson's Case.* (3) "It is the province of the statesman, and not the lawyer, to discuss, and of the Legislature to determine, what is the best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law only; the written from the statutes: the unwritten or common law from the decisions of our predecessors and of our existing Courts, from text-writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; not to

(1) [1915] P. 26.
(2) [1902] A. C. 484.
(3) [1902] A. C. at p. 496.
(4) (1853) 4 H. L. C. 1, at p. 123.

speculate upon what is the best, in his opinion, for the advantage of the community. Some of these decisions may have no doubt been founded upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of the recognised law, and we are therefore bound by them, but we are not thereby authorised to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise."

These weighty and well chosen words uttered by a master of the common law and approved in 1902 by the House of Lords are a conclusive answer to the argument addressed to us on public policy.

The second ground of appeal was that there was no authority in the solicitor to issue a writ or to continue this action on behalf of the plaintiff company. In the first place such an objection must be raised by a proceeding to strike out the case and cannot be heard at the trial as a defence to the action. It is the invariable practice of the Court to require the challenge to be made by such a proceeding and not to allow the point to be taken at the hearing: see *Richmond* v. *Branson & Son* (1), per Warrington J. It is very desirable that this practice should be maintained and that this procedure should be the only mode of challenging the solicitor's retainer. Lush J. evidently doubted whether the point could be raised by way of defence, but in view of his finding it was not necessary for him to decide it. We do not wish to rest our decision entirely upon an objection of procedure, as we agree with Lush J. that upon the evidence before him there was sufficient ground for holding that the authority had been established. The argument was that the directors alone could issue instructions to sue, and that as from the outbreak of war the directors' authority to manage and control the affairs of an English company was revoked and no other directors had been appointed, there was no person in existence who could give authority. But assuming that there were no directors the company's business was still being conducted, the managers and secretary were in attendance, agents,

(1) [1914] 1 Ch. 968.

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clerks, and others were still employed; a sum of 9000*l.* per month was being drawn and distributed in the United Kingdom. The company's affairs were not at a standstill notwithstanding that they could not import goods from or remit money to Germany or the German company or engage in commercial intercourse with it. The secretary had been in the habit of giving instructions to the solicitor to commence proceedings; he said such matters had always been left to him and that he had authority to issue the writ. That is the evidence accepted by the judge as fact. Has such authority been revoked since the outbreak of war? There is no evidence to that effect, neither is there any revocation by operation of law. The directors act on behalf of the company, and though they may cease to exist the company still lives. The management and the secretary derive their authority not from the directors but from the company given by the directors as the representatives of the company, and that authority from the company to act for it continues until revoked.

The appellants have failed to establish that there was no authority in the secretary to give instructions for the issue of the writ.

It is advisable for future guidance to deal with one argument of Mr. Campbell for the plaintiff company. He contended that as a person had been appointed by the Board of Trade under s. 2, sub-s. 2, of the Trading with the Enemy Act, 1914, with authority to inspect the plaintiff company's books and documents and to require information as to the business carried on by the plaintiff company, the plaintiff company must be assumed to have been impliedly licensed to trade under the protection of the Crown or authorized by the Executive to carry on business in this country. Such a licence or authority to trade is in our judgment not to be implied from the words of the statute. The Legislature intended that during the war there should be certain powers vested in the Executive without any warrant from a justice to obtain information as to whether or not a person, firm, or company was trading with the enemy, and under sub-s. 2 (*b*) prescribed the conditions precedent to the exercise of these powers in the case of a company. The powers may be exercised when one-third or more of the issued share capital or of the directorate of the company is

held by alien enemies, that is, persons resident or carrying on business in an enemy State or by subjects of an enemy State, notwithstanding that they may be resident or carrying on business in this country. Parliament deemed it advisable in such cases to confer special powers on the Executive to be exercised if the Executive deemed it expedient. If it suspected that the company was trading with the enemy, information could be obtained from the books and documents of the company and from inquiry of any person able to give information as to the business of the company, and under s. 13 of the Trading with the Enemy Amendment Act, 1914, such information could be used in evidence against the informant. The whole object of s. 2 was to provide means of information in cases which might naturally in time of war give rise to suspicion that assistance was being rendered to the enemy; it is an extra precaution. It is merely a section enabling the Executive to take steps which otherwise could not be taken for the protection of national interests during the war, and it is not in our opinion to be construed as giving a licence or authority to trade when such licence or authority were required.

In our opinion both appeals must be dismissed with costs. This is the judgment of all the members of the Court except Buckley L.J. The late Kennedy L.J. had read the judgment I have just delivered and approved it before his death.

The following judgment was read by

BUCKLEY L.J. I regret that I am unable to concur in the judgment just delivered. I regard the question as so momentous that I make no apology for stating as clearly as I am able my reasons for arriving at a contrary conclusion.

The artificial legal entity created by incorporation under the Companies Acts is a legal person existing apart from its corporators. This proposition is true without exception, and nothing in this judgment questions the proposition in any way. If there be twelve corporators one of them is not a twelfth or any other part of the corporation. The total number of twelve do not in the aggregate constitute the corporation. On the other hand the corporation cannot exist without corporators. If

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there are no corporators there can be no corporation. Corporators are essential to the existence of but form no part of the corporation.

The artificial legal person called the corporation has no physical existence. It exists only in contemplation of law. It has neither body, parts, nor passions. It cannot wear weapons nor serve in the wars. It can be neither loyal nor disloyal. It cannot compass treason. It can be neither friend nor enemy. Apart from its corporators it can have neither thoughts, wishes, nor intentions, for it has no mind other than the minds of the corporators. These considerations seem to me essential to bear in mind in determining the present case.

The corporation if it be a British corporation stands in the same position for most purposes as a British subject. For instance as regards rights of ownership of property and the right to protection and assistance by the law. But while it stands for most purposes in the position of a British subject it cannot, I think, be correctly described as a British subject. A subject must, I conceive, be one who can owe and pay allegiance to the King, who can serve the King physically, for instance if he be a male by wearing weapons and serving in the wars, who has a mind and can be either loyal or disloyal to the King. None of these can be predicated of the abstract legal entity. It has no existence at all except in contemplation of law. If these propositions be true, as I think they are, they seem to me to go to the root of the question which has in this case to be determined.

This corporation is one which as a corporation certainly has in law an independent legal existence and that legal person is British. But on the other hand all its directors are Germans resident in Germany. The holders of all its 25,000 shares except one share are Germans resident in Germany. The artificial legal thing is British, resident in England. But all its corporators who can have thoughts, wishes, or intentions are Germans resident in Germany.

The question for determination is whether when all the natural persons who express and give effect to their wishes through the corporation as a legal abstraction are Germans

resident in Germany the corporation can sue in this country because those persons who could not sue are as matter of law absorbed in a separate legal person which is British and which (regarding the corporation as a legal person existing apart from and irrespective of its corporators) can sue.

The contractual relations constituted by membership in a corporation under the Companies Acts are singular. The relation between each corporator and the corporation is a contractual relation governed by the statute, involving rights within the corporation, rights against the corporation, and liabilities towards the corporation. Where the corporator is an alien enemy these relations may be vitally affected by a state of war. The motive power of the corporation (which in itself apart from its corporators, or its agents—appointed and authorized through acts done by the corporators—has no life and no power of action) may become paralysed and suspended by the existence of war in a case where every corporator is as an alien enemy under disability as such.

Suppose the case of a corporation sole. A private company may be formed consisting of only two persons. It was much debated a few years ago whether the law should not be so altered as to allow a sole person to incorporate himself as a company with limited liability. Suppose that were the law, and an individual German resident in Germany, an alien enemy in fact, became incorporated here as a British company, could it be seriously contended that in time of war that alien enemy because he had acquired a legal corporate name and had an artificial legal existence in this country was consequently for the present purpose not an alien enemy? Does it make any difference that there must be two persons, or again does it make a difference that the number is seven or ten? The number of corporators in the present company is six.

The immense importance of the question whether it is impossible for any purpose to look behind the corporation at the person of the corporator may be illustrated by the case of merchant shipping. Under s. 1 (*d*) of the Merchant Shipping Act, 1894, ships owned by a shipping company incorporated in this country are British ships. The individual members of that body

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corporate may be aliens. If the personality of the corporators can for no purpose be regarded there is nothing to prevent alien enemies from owning and sailing British ships under the British flag. If this judgment be (as having regard to the judgment of the other members of the Court I must assume that it is) wrong, the matter is one which calls urgently for legislation.

The proposition that an alien enemy cannot sue rests, I conceive, upon the proposition that such an one cannot approach the King, has no resort to the King, and cannot invoke the assistance of the King. The Court is the King's Court. The alien enemy cannot come into that Court or have the assistance of that Court because the Court is for judicial purposes the King sitting in his Court and the alien enemy cannot approach him. Take the assumed case of the sole person incorporated as I have supposed; can that sole person be entitled to access to the King and assistance from the King because in contemplation of law he is entitled to clothe and has clothed himself in a British dress and notionally but not in fact is British? Take the case of two Germans who had formed a private company; can they approach the King? Take the present case of six Germans; can they approach the King? To say that they can because it is not they but the British corporation which approaches the King seems to me to be unsound. The proposition that it is the British corporation and not the corporators which as matter of legal intendment comes into Court is true, but for the relevant purpose it is not true. The artificial legal entity has no independent power of motion. It is moved by the corporators. It is the German corporator who, under the corporate name but still German for the relevant purpose of friendliness or enmity, is the person who comes. He is German in fact although British in form.

The question is not wholly without authority which may be a guide. In *City of London* v. *Wood* (1) the City of London brought a suit against Wood by their corporate name in the Mayor's Court. Objection was taken that the Court had no jurisdiction by reason of the fact that the Court was held before the Mayor and Aldermen and the action brought in the names

(1) 12 Mod. 669.

of the Mayor and Commonalty and that it is against all law that the same person should be party and judge in the same cause. The objection rested therefore upon the character of the individuals who were members of the Corporation. The judges were unanimous in holding that they could look beyond the corporate name and notice the character of the individual. In *Bank of the United States* v. *Deveaux* (1) the principle of that case was followed in the United States in the case of a suit brought by a corporation aggregate composed of citizens of one State against the citizens of another State in the Circuit Court of the United States. The jurisdiction of that Court was limited to controversies between citizens of different States. The Court affirmed (see p. 86) that the artificial legal entity the corporation aggregate was not a citizen and could not sue unless the rights of the members in this respect could be exercised in their corporate name, and that the Court had consequently no jurisdiction unless it could regard the rights of the members in the corporation, for they were citizens. The view the Court took was (see p. 91) that the controversy was substantially between aliens suing by a corporate name and a citizen; or between citizens of one State suing by a corporate name and those of another State. "That name" said Marshall C.J. at p. 87 (meaning the corporation by the corporate name) "cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted." The Court accordingly upheld the jurisdiction. Referring to this case, Story J. in giving judgment in *Society for the Propagation of the Gospel* v. *Wheeler* (2) said: "But in the character of its members, as *aliens*, we have incontestable authority to enforce the corporate rights; and it has been solemnly settled by the Supreme Court, that for this purpose the Court will go behind the corporate name, and see who are the parties really interested. And if, for this purpose, the Court will ascertain who the corporators are, it seems to follow, that the character of the corporators may be averred, not only to sustain, but also to

(1) 5 Cranch, 61. (2) 2 Gallison, 105, at p. 133.

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bar, an action brought in the name of the corporation. It might therefore have been pleaded in this case, even if the corporation had been established in a neutral country, that all its members were alien enemies; and upon such a plea, with proper averments, it would have deserved great consideration, whether it was not, *pendente bello*, an effectual bar." In my opinion the principles laid down in those cases are correct, and none the less because they have, as the Lord Chief Justice has pointed out, been subsequently observed upon in the United States.

In *Janson* v. *Driefontein Consolidated Mines* (1) I do not find any decision to the contrary. The decision there was against the underwriter. The objection that the company was an alien enemy was in his favour. The House made the assumption in his favour and nevertheless decided against him. It was therefore unnecessary to decide the point, and what was said by the noble and learned Lords was only dictum. Lord Halsbury (p. 490), Lord Macnaghten (p. 497), and Lord Davey (as I read his judgment) at p. 498 in fact assumed it, as distinguished from deciding it. Lord Brampton (p. 501) may be read as deciding it, and Lord Lindley (p. 505) perhaps even more plainly so. But it cannot be said that the House decided it when it did not arise for decision, and some at any rate of its members plainly abstained from deciding it and stated that they assumed it for the purpose of the decision.

An argument has been advanced that some language in the Act of 1914 and the Proclamation made under it bears upon the question—I think not.

I find in s. 2, sub-s. 2 (*b*), of the Trading with the Enemy Act, 1914, neither licence nor recognition relevant in the matter. The subjects of the enemy State there spoken of may be subjects resident in Great Britain and consequently not alien enemies. They may be British subjects resident or carrying on business in the foreign State and thus alien enemies by residence and not by nationality. There are many cases to which the sub-section may relate without making the assumption that it relates to a company in which all the corporators are subjects of the enemy State residing in the enemy State. To operate as a licence or

(1) [1902] A. C. 484.

recognition the words of the statute ought, I apprehend, to be plain. So far from their being plain it seems to me that it is only by a strained construction that the words can be made relevant to the subject-matter at all.

The definition of enemy in the Proclamation of September 9, 1914, has in my opinion no bearing upon the matter. A Proclamation can neither make nor declare the law, and even if it could that definition does not affect so to do. It does no more than attribute a meaning to a particular word in a particular document. The last words of the article upon which the question arises seem to me, moreover, very obscure. Strictly read it would seem that according to the definition enemy character would not attach to a British corporation resident (as it may be) or carrying on business (as it may do) in the enemy country when it does attach to a natural person so resident or carrying on business. The reason of the difference is far to seek.

For the above reasons I am of opinion that the Continental Tyre Company stand for the present purpose in the position of alien enemies, for that, to use the language of *Bank of the United States* v. *Deveaux* (1), the action is by "aliens suing by a corporate name." I therefore think that these appeals should be allowed. The right form of order I think would be to set aside the service of the writ and to order the plaintiffs to pay the costs of the action.

Appeals dismissed.

Solicitors for plaintiffs: *Stephenson, Harwood & Co.*

Solicitors for Daimler Company: *Andrew Wood, Purves & Sutton, for R. A. Rotherham, Coventry.*

Solicitors for Thomas Tilling, Limited: *Hicklin, Washington & Pasmore.*

(1) 5 Cranch, at p. 91.

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[IN THE COURT OF APPEAL.]

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Insurance (Marine)—Warranty of Freedom from Capture—Capture of Neutral Ship by Belligerents—Constructive Total Loss—"Unlikely that he can recover the ship"—Marine Insurance Act, 1906 (6 *Edw.* 7, c. 41), *s.* 60, *sub-ss.* 1, 2 (i).

A neutral ship carrying a cargo of coal and insured against the consequences of warlike operations was captured by a belligerent, deprived of her cargo, and detained for about six weeks, when she was released. In an action claiming to recover on the policy:—

Held, on the facts, affirming the decision of Pickford J., that if the present action had come on for decision before the Marine Insurance Act, 1906 (1), the owners would have been entitled to recover upon the policy of insurance as for a constructive total loss; that before 1906, if the taking of the vessel out of the possession of the owners continued in operation at the commencement of the action and the owners' loss, once total, was one which might be permanent and was at any rate of uncertain continuance, they were entitled to recover for a constructive total loss; but that by the Act of 1906 the test of "unlikelihood of recovery" had been substituted for "uncertainty of recovery"; and that the owners had not shown that there was more likelihood that they would not, than that they would, recover the ship, and their claim failed.

Appeal from a decision of Pickford J.

By a Lloyd's policy of insurance of October 2, 1912, the steamship *Polurrian* was insured for 23,000*l.* "free of capture seizure and detention and the consequences thereof or any

(1) Marine Insurance Act, 1906, s. 60:

"(1.) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

"(2.) In particular there is a constructive total loss—

"(i.) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (*a*) it is unlikely that he can recover the ship or goods, as the case may be, or (*b*) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered."

attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war."

On October 9, 1912, the *Polurrian* sailed from Newport with a cargo of coals consigned to English merchants at Constantinople. On October 17, 1912, war was declared between Greece and Turkey; and on the 28th the Greek Government declared fuel to be contraband of war. On the 25th the ship was captured by Greek men-of-war and her cargo was removed from her and used for coaling the Greek fleet. On the 26th notice of abandonment in writing was given by the plaintiff company to the insurers. The ship was detained by the Greek Government until December 8, 1912, when they released her. The facts are fully stated in the judgment of Kennedy L.J.

The plaintiffs brought this action against the underwriters for 23,000*l.* as and for a constructive total loss and damages. It was agreed that October 26 should be taken as the date of the issue of the writ. The defendants admitted that the ship was detained but denied that she was captured, and contended that at no material time was it unlikely that the plaintiffs would recover her.

Pickford J. decided in favour of the defendants, and the plaintiffs appealed.

Adair Roche, K.C., and *A. Neilson*, for the appellants. Pickford J. has held that where there is a capture the prospect and chances of condemnation ought to be considered. In the case of a capture there is an apparent loss which gives right to abandonment, and in this case the subsequent release of the vessel enured for the benefit of the underwriters: *Goss* v. *Withers* (1); *Andersen* v. *Marten*. (2) The ship is constructively lost when captured, although there may be a chance of getting her back. This case comes within s. 60 of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), the "actual total loss appearing to be unavoidable" (sub-s. 1), and the recovery being "unlikely" within sub-s. 2. Pickford J. has introduced the examination of future prospects by the application of s. 91, sub-s. 2, which

(1) (1758) 2 Burr. 683. (2) [1908] A. C. 334.

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provides that "the rules of the common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance." The old law is not inconsistent with the provisions of s. 60, and is to be found in the following cases:— *Goss* v. *Withers* (1); *Hamilton* v. *Mendes* (2); *Cologan* v. *London Assurance Co.* (3); *Dean* v. *Hornby* (4); *Lozano* v. *Janson* (5); *Shepherd* v. *Henderson* (6); *Cory* v. *Burr* (7); *Ruys* v. *Royal Exchange Assurance Corporation.* (8)

[KENNEDY L.J. referred to *M'Iver* v. *Henderson* (9) and Phillips' Law of Insurance, 5th ed., vol. ii., ss. 1530, 1620, 1621 and 1704.]

The capture or detention of a vessel for a temporary purpose gave no ground for abandonment, but if the loss of the ship was of uncertain continuance the owner who had given notice of abandonment was entitled to recover for a constructive total loss. The Act of 1906 was not intended to make any difference in the existing law: *Sailing Ship "Blairmore" Co.* v. *Macredie* (10); *Bank of England* v. *Vagliano Brothers* (11); Phillips' Law of Insurance, 5th ed., vol. ii., s. 1903. The question was whether there was a seizure with intent to confiscate: *Robinson Gold Mining Co.* v. *Alliance Insurance Co.* (12) In the present case the Greeks intended to keep the ship, so there was a complete seizure, and it was uncertain whether the owners would recover her. That was sufficient under the old law to constitute a constructive total loss. The words in s. 60, sub-s. 2 (i.), of the Act of 1906 "unlikely that he can recover" mean the same as uncertainty. That Act does not profess to be an exhaustive code of law on the subject, and the old rule applies.

Maurice Hill, K.C., and *R. A. Wright*, for the respondent. The judgment of Pickford J. is right, for there has not been either an actual or a constructive total loss. The ship was only

(1) 2 Burr. 683.
(2) (1761) 2 Burr. 1199.
(3) (1816) 5 M. & S. 447.
(4) (1854) 3 E. & B. 180.
(5) (1859) 2 E. & E. 160; 28 L. J. (Q.B.) 337.
(6) (1881) 7 App. Cas. 49.
(7) (1883) 8 App. Cas. 393.
(8) [1897] 2 Q. B. 135.
(9) (1816) 4 M. & S. 576.
(10) [1898] A. C. 593, 609.
(11) [1891] A. C. 107, 144.
(12) [1904] A. C. 359, 362.

taken for a temporary purpose, and that is not a total loss under the Act of 1906 or under the previously existing law. Even if she was taken as a prize there is no authority that a neutral ship thus taken is a total loss. Under the present Act there must be a taking such as is likely to be permanent. The question depends on the state of affairs on October 26; and subsequent events do not affect the right of action. The test is what were the true facts at that date, not what the assured thought were the true facts: Arnould on Marine Insurance, 9th ed., ss. 1095, 1096; *Bainbridge* v. *Neilson* (1); *Sailing Ship "Blairmore" Co.* v. *Macredie.* (2) On October 26 there was not in fact any idea of confiscating the *Polurrian;* there was no possibility of her being condemned as a prize. The Greeks wanted her cargo of coal, and were entitled to take it on payment: arts. 43 and 64 of the Declaration of London; *Castrique* v. *Imrie.* (3) All parties would be bound by the decision of the Prize Court. It is suggested that this was an actual total loss, but there cannot be an actual total loss where the ship is still in existence: *Hamilton* v. *Mendes* (4); *Brotherston* v. *Barber.* (5)

[KENNEDY L.J. referred to *Cossman* v. *West.* (6)]

There is no case which lays down that capture is of itself an actual total loss: *Lozano* v. *Janson* (7); Arnould on Marine Insurance, 9th ed., s. 1091. The question is whether there is a constructive total loss: *Ruys* v. *Royal Exchange Assurance Corporation* (8); *Andersen* v. *Marten* (9); *Mansell & Co.* v. *Hoade* (10); *Mullett* v. *Shedden.* (11) To enable the appellant to establish constructive total loss he must now show that s. 60, sub-s. 2 (i.), of the Act of 1906 has been complied with and that he was unlikely to recover the ship: *Hall* v. *Hayman* (12), which shows that the Act of 1906 has altered the law. There never was any general rule that loss of possession was a constructive total loss without more. The distinction between ship and cargo has long been recognized: *Falkner* v.

(1) (1808) 10 East, 329, 341.
(2) [1898] A. C. 593.
(3) (1870) L. R. 4 H. L. 414, 448.
(4) 2 Burr. 1199, 1210.
(5) (1816) 5 M. & S. 418.
(6) (1887) 13 App. Cas. 160.
(7) 2 E. & E. 160; 28 L. J. (Q.B.) 337.
(8) [1897] 2 Q. B. 135.
(9) [1908] A. C. 334.
(10) (1903) 20 Times L. R. 150.
(11) (1811) 13 East, 304.
(12) (1911) 17 Com. Cas. 81, 88, 93.

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Ritchie (1); *Stringer* v. *English and Scottish Marine Insurance Co.* (2) Events which happened after October 26 are immaterial: *Smith* v. *Robertson* (3); *Cologan* v. *London Assurance Co.* (4); *Shepherd* v. *Henderson* (5); *Dean* v. *Hornby.* (6) This is a taking by belligerents of goods from a neutral, so there was a presumption that the ship would be restored: *Rodoconachi* v. *Elliott.* (7) It ought not to have been seized: *Cory* v. *Burr* (8); *Rotch* v. *Edie* (9); *Barker* v. *Blakes* (10); *Anderson* v. *Wallis* (11); Arnould on Marine Insurance, 9th ed., ss. 829, 832, 1108, 1184; Phillips' Law of Insurance, 5th ed., vol. i., ss. 1108, 1109; vol. ii., ss. 1523, 1525, 1620, 1621; Marshall on Marine Assurance, 4th ed., p. 394. The assured has to give notice of abandonment as soon as he gets information that the ship is in imminent danger: *Kaltenbach* v. *Mackenzie.* (12) But that is not all that the appellant now has to do; he has to comply with s. 60, sub-s. 2, and show that he is unlikely to recover the ship as well as that he has been deprived of possession. It is a question of fact and the learned judge has come to a right conclusion. "Recovering" the ship is not limited to recovering her by means within the control of the assured. In a case like this the probability that the ship will be released cannot be excluded from consideration. Everything which may result in recovery must be considered. It is impossible to say that this was a total loss; and inasmuch as the appellant has not proved on a balance of probabilities that he was unlikely to recover the ship it cannot be treated as a constructive total loss.

Adair Roche, K.C., in reply. The respondent's case depends on the assumptions that this was not a capture and that there is a distinction between the taking by a belligerent of an enemy ship and the taking of a neutral ship. No such distinction is to be found in the authorities: *Bolton* v. *Gladstone* (13); *Powell* v. *Hyde* (14); *Roux* v. *Salvador.* (15) This case comes within s. 60

(1) (1814) 2 M. & S. 290.
(2) (1870) L. R. 5 Q. B. 599.
(3) (1814) 2 Dow. 474.
(4) 5 M. & S. 447.
(5) 7 App. Cas. 49, 70.
(6) 3 E. & B. 180.
(7) (1873) L. R. 8 C. P. 649, 659; (1874) L. R. 11 C. P. 518.
(8) 8 App. Cas. 393.
(9) (1795) 6 T. R. 413.
(10) (1808) 9 East, 283.
(11) (1813) 2 M. & S. 240.
(12) (1878) 3 C. P. D. 467, 472.
(13) (1804) 5 East, 155.
(14) (1855) 5 E. & B. 607.
(15) (1836) 3 Bing. N. C. 266.

sub-s. 1, "actual total loss appearing to be unavoidable," and the assured is not required to prove that he was unlikely to recover the ship.

Cur. adv. vult.

1915. Feb. 5. LORD COZENS-HARDY M.R. The judgment which Warrington J. is about to read was Kennedy L.J.'s judgment. The day before his death he told me that he had finished it, and had ordered two copies to be typed for his colleagues to read. These copies were in his room when he died. Warrington J. and I have carefully read and considered this judgment. We agree with it and desire that it should be taken as the judgment of the Court. To regularize this procedure, we propose that the judgment should be dated January 16, the day before Kennedy L.J.'s death.

WARRINGTON J. read the judgment as follows.

The question for our determination upon the appeal in this case is whether or not, on October 26, 1912, when the plaintiffs, the owners of the steamship *Polurrian*, gave notice of abandonment of that vessel to the defendant, the insurer, and are, by agreement, to be taken as having issued the writ in this action, the state of things was such as to entitle the plaintiffs to recover upon the policy of insurance as for a constructive total loss. Pickford J. has dismissed the plaintiffs' claim; and the plaintiffs have appealed to this Court against his decision.

The policy of insurance, so far as its contents are material to the matter in dispute, covered the plaintiffs against the risks of capture, seizure, and detention and the consequences thereof or any attempt thereat, piracy excepted; and also from all consequences of hostilities or warlike operations, whether before or after declaration of war. The plaintiffs allege, and the defendant denies, that on October 26, 1912, there was a constructive total loss of the *Polurrian* by one of the perils thus insured against. Now it is indisputable that, according to the law of England, in deciding upon the validity of claims of this nature between the assured and the insurer, the matters must be considered as they stood on the date of the commencement of

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the action. That is the governing date. If there then existed a right to maintain a claim for a constructive total loss by capture, that right would not be affected by a subsequent recovery or restoration of the insured vessel. (See the judgment of Collins J. in *Ruys* v. *Royal Exchange Assurance Corporation* (1), which reviews the history of the law upon this point.) In strictness, therefore, in regard to the facts, I might, I think, confine myself for the purpose of this judgment to a statement of them as they stood on October 26, which, as I have said already, is by agreement to be taken as the date of the issue of the writ in this action, and was also the date of the plaintiffs' notice of abandonment. As, however, the learned judge has in his judgment included a review of the events which occurred in reference to the *Polurrian* after she had been taken by the Greek naval forces out of the possession of the plaintiffs on October 25, 1912, until her release seven weeks later, on December 8, and has drawn therefrom, in support of his conclusions, inferences more favourable to the defendants' case than, I venture with all respect to think, the evidence warrants, I do not think that it would be proper for me, having to consider that judgment, wholly to confine my reference to the facts to their position on October 26. But that is the material date; and I shall deal with the later period as briefly as possible.

The *Polurrian*, laden with a cargo of Welsh coal, and bound for Constantinople, was on October 25, 1912, off the island of Tenedos. Her master, Mr. Jones, had known of the war between Italy and Turkey, which existed when the *Polurrian* started on her voyage, but had terminated before October 25. He did not know that Greece was at war with Turkey. Off Tenedos the *Polurrian* was overhauled by Greek warships, and taken by them to Mudros Bay, a harbour in the island of Lemnos, in which a portion of the Greek fleet was lying. The master, in the course of his interview with the Greek officer who had come on board the *Polurrian* when she was arrested, told the officer that he did not know of the war; and the order to follow the Greek destroyer to Mudros Bay was given after the officer had communicated by wireless telegraphy with the Greek admiral,

(1) [1897] 2 Q. B. 135.

with the result that he informed the master of the *Polurrian* "that he had orders to seize us; that he would have to convoy us to Mudros Bay, in the isle of Lemnos." In the evening, after the *Polurrian* had anchored in the spot designated by an officer from the flagship, the master of the *Polurrian* was further interrogated as to his cargo and destination, the ship's papers were examined, and the master was told by the Greek officer (I quote the words textually from the shorthand notes, p. 5) that "his country intended to confiscate the cargo, but they were not quite sure what they would do with the ship; but in the meantime the ship would be deemed a capture, although he personally did not think it could be maintained." The master, either the same evening or the next day,—the telegram is dated the 26th—telegraphed to the plaintiffs (documents, p. 25): "Arrived Mudros Bay Lemnos Island convoyed Greek destroyer Now waiting admiral's instructions All well Please inform families." The next day the *Polurrian* was ordered alongside the flagship in order to coal her, and the master of the *Polurrian* had a conversation with the Greek admiral, through an interpreter, the flag-lieutenant, who spoke, says Mr. Jones, indifferent English (shorthand notes, p. 7), in the course of which the master of the *Polurrian*, according to his account, told the admiral, in answer to questions as to his knowledge of hostilities between Greece and Turkey, that he had no knowledge of them; and the conclusion of the interview, so far as regards the fate of the vessel, as distinguished from her cargo, appears in the following question and the witness's answer thereto (shorthand notes, p. 6): "(Q.) Did he tell you at all what would ultimately be done with the ship? (A.) No. With regard to the ship he said he was not quite sure; it was a doubtful question; but that the question could be settled later on; in the meantime the capture of the ship would be maintained; and they would take the cargo." This is the master's evidence as to facts in regard to October 25 and 26, and I see no reason to doubt its substantial accuracy. But one important additional fact has to be added. Although the master of the *Polurrian* no doubt intended in his interview with the Greek admiral to convey to him through the

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interpreter his ignorance of the existence of war between Greece and Turkey, it is quite plain that he conveyed in fact a very different impression. It is clear beyond doubt that the admiral understood him to admit that he did know of the war, and that, treating it as a serious admission, the admiral so informed his Government at Athens, and that it was upon this ground that that Government maintained the capture until December 8. I say that this is quite clear, because on October 28 our Foreign Office, whose intervention for the release of the *Polurrian* had been invoked by the plaintiffs and the defendant, telegraphed to the plaintiffs: "H. M. Minister at Athens reports Greek Government maintain capture to be lawful. He has demanded reference to Prize Court"; and on the same day Mr. Henderson, the underwriters' agent at Athens, telegraphed to the Salvage Association, acting for the underwriters in London: "*Polurrian.* Government considers prize alleging captain admitted was aware declaration war. British Minister had informed Greek Government vessel must come Piræus and matter decided by Prize Court here." (See also the letter from Henderson at Athens to the Salvage Association in London October 28: correspondence pp. 45 and 46.)

I have now stated, and I hope accurately stated, the facts as they existed on the material date, October 26, 1912, the agreed date of the commencement of the present action, and the date on which the plaintiffs, having received from the master of the *Polurrian* at Mudros Bay the telegram which I have already set out, caused notice of abandonment on the ground of loss by capture to be given to the insurers. As it is, I think, for the reasons which I have given, proper that I should deal with the subsequent history of the transaction, it will be convenient, for the sake of clearness, that I should now complete the narrative before considering the legal rights of the parties to this litigation as they stood at that date.

A few days after October 26, and after the commencement of the discharge of the *Polurrian's* cargo into the Greek warships in Mudros Bay, the master had an interview with an officer whom he describes as the admiral's secretary. The master asked him as to the ship, and was told that the question of the ship would

be settled by the Government, and that he (the secretary) thought it would have to go to the Piræus. (Shorthand notes, p. 7.) On November 28, when the discharge was completed, the master of the *Polurrian* was ordered to proceed to the Piræus, and there present himself at the General Shipping Office. He obeyed those orders, sailed to the Piræus, which he reached on November 29, and was there directed by the captain of the port to await the instructions of the Minister of Marine. He was informed by the British Minister at Athens that the Greek admiral stated that he (Captain Jones) had admitted knowledge of the declaration of war before sailing, and that the Greek Government was claiming that the *Polurrian* was a lawful prize; that a Prize Court was going to be held, and that he (Captain Jones) would have to give evidence. (Shorthand notes, p. 9.) On December 1 an armed guard was put on board by the Greek authorities; and, by orders of the officer in command of the guard, the *Polurrian*, with the guard on board, was navigated to the naval arsenal at Salamis; and there remained until her release on December 8.

Meanwhile, from October 28 onwards the underwriters and the owners, without prejudice to their respective contentions as to the validity of the notice of abandonment, had continued vigorously and persistently, through the Foreign Office in London and the British Minister at Athens, to press the Greek Government for the release of the *Polurrian*. At one time, during the first fortnight of November, it appeared likely that the application would succeed, so far, at any rate, as regards her release after her cargo had been discharged at Lemnos. (See the correspondence November 1 to 14.) But if the Greek Government ever led our Minister at Athens, as it seems that they did, to suppose that such a course would be adopted, they altered their views on November 15; the *Polurrian* after her cargo had been taken out of her was brought to Piræus and thence to Salamis with the intention that her case should be dealt with by a Prize Court; and on December 4 Mr. Henderson, who, as I have already said, represented the interest of the underwriters at Athens, telegraphed to the Salvage Association in London: "*Polurrian* must go before Prize Court on ground that captain made statement alleged knowing state of war. Court will be

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formed in about two days. Will cable later asking certain instructions." There is in the correspondence a letter written from Athens on December 5 by the same gentleman to the like effect. On December 8 the Greek Government released the *Polurrian*. It appears from a letter from Messrs. Harris & Dixon, Limited, to the plaintiffs, dated December 9 (correspondence, p. 207), and referring to a communication just received in London from Lloyd's agent at Athens, that the Government did so after submitting the question to the Legal Council of State, "who decided no capture under article 43 of the Declaration of London." On October 15, 1913, the Greek Administrative Prize Court rejected the claim put forward on behalf of the owners of the *Polurrian* for indemnity for her seizure and detention, holding that the seizure and detention were justifiable, and holding, in substance and effect, that whilst in fact he was, whilst carrying the coal cargo, ignorant of the outbreak of the Greco-Turkish war, the master of the *Polurrian* had used words which might fairly be construed as meaning that he was aware of the war, and "it could well be considered that both the vessel and her cargo were subject to seizure." On careful consideration of the evidence given by the master of the *Polurrian*, and of the admitted correspondence and admitted documents, I must confess myself, with all respect to my brother Pickford, unable to concur in the view which, reading his judgment in the Court below (1), I understand him to express, namely, that neither the Greek admiral nor the Greek Government ever entertained any real doubt as to the right of the owners of the *Polurrian* to have the ship restored to them; that the Greek authorities knew quite well that they had no grounds for condemning this ship, and meant only to keep her so long as it was convenient for them to keep her to coal their fleet. In my view, the evidence shows that the Greek admiral attached serious importance to the admission which he understood the master of the *Polurrian* to make when examined by him at Lemnos as to his knowledge of the state of war; and so did the Greek Government when he communicated it to them between October 26 and 28, as shown by the communication to our Foreign Office, which appears in the telegram of the latter

(1) *Polurrian Steamship Co.* v. *Young*, 19 Com. Cas. 143, at pp. 156, 157.

date from our Foreign Office to the plaintiffs. A few days after the capture, and, therefore, soon after the discharge of the cargo at Mudros Bay had begun, the master of the *Polurrian* was informed by the secretary of the admiral that the question as to the ship would be settled by the Government, and that he thought the ship would have to go to the Piræus—for the purpose, as I understand the words, of having the question of the right to condemn her as a prize settled by a Prize Court. In regard to our own Minister at Athens, the inference which I draw from the evidence is that he also treated the question of the release of the *Polurrian* as a real question. On the arrival of the *Polurrian* at the Piræus he calls the attention of the master to his alleged admission to the admiral and tells him that he will have to go into Court and give evidence. And, indeed, it was the British Minister who had from the first insisted that the *Polurrian* ought to come to the Piræus and be dealt with by a Prize Court: "Government considers prize, alleging captain having admitted was aware declaration war. British Minister had informed Greek Government must come Piræus and matter decided by Prize Court here." (Henderson's telegram to Salvage Association, October 28, 1912. Correspondence, p. 43.) The release of the *Polurrian* on December 8 was due, no doubt, mainly to the fact that the evidence of her master, obtained after the arrival of the *Polurrian* at the Piræus, had then been shown to the Greek Government, and that the Government, after consulting the Legal Council of State, decided to accept his denial of knowledge of the war, and his denial of having intended in his interview with the Greek admiral to make any admission to the contrary. As to what the master thought at any time as to the prospect of the *Polurrian* being released, either soon or ultimately, I cannot find in the evidence any satisfactory proof; and I venture to think that the learned judge was under some misapprehension when he stated in the course of his judgment that the master in his evidence that he gave in Court said that practically all the officials that he saw expressed their own personal view that they had no right to touch the ship, that is to say, no right to condemn it; and he certainly did not think that the ship was not going to be restored within a reasonable time. At any

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rate, I have failed to find such a passage in the shorthand notes of his evidence taken at the trial. It is quite true that in a written statement which he gave to the underwriters' solicitors at Athens, made, as he deposed, "for the benefit of the underwriters in the interest of the underwriters," and "against the Greeks" (shorthand notes, p. 21, and see also p. 26), there are words which might have that effect.

The fair result of the evidence, in regard to the position of the *Polurrian* on October 26, whether viewed apart from subsequent events, as I think it should be, or by the light of those events, was, in my judgment, one in which her ultimate release from capture was a matter of uncertainty. There was, of course, a possibility that she would be released after the cargo had been discharged out of her without her being subjected to adjudication in the Greek Prize Court; there was a good ground for belief that the Greek Government would release the vessel, being a neutral vessel, as in fact they did, without waiting for the decision of a Prize Court, if that Government could be persuaded that the master of the *Polurrian* was pursuing his voyage in ignorance of the war, and that at all events the Prize Court would be satisfied of this when the evidence of the master was before it. On the other hand, the Greek admiral believed that he had an admission from the master that he did know of the war, and both he and the Greek Government did take the view which finds expression in the judgment given by the Greek Prize Court, as appears by their judgment, published October 29, 1913, that if this knowledge existed "it could well be considered that both the vessel and the cargo were subject to seizure," or, as Henderson's telegram from Athens of October 28 puts it, and Harris & Dixon's letter to the plaintiffs of the same date puts it, that the *Polurrian* might be considered lawful prize.

Even if the *Polurrian* should be released, either by the Greek Government or by the decision of a Prize Court, the date of such release was obviously uncertain; it might be weeks or months, or longer, before the matter would be settled. Assuming that this was, as it appears to me to have been, the true position of affairs, I am of opinion that if the present action had come to be decided before the Marine Insurance Act, 1906, had come into

force, the plaintiffs would have been held to have been entitled to recover upon the policy of insurance as for a constructive total loss. According to the law as it stood before the passing of that Act, the seizure or arrest or detention of a vessel for that which is either avowedly or obviously a temporary purpose, which will end within a period not, from the commercial standpoint, unreasonably long, as in the case cited by Arnould on Marine Insurance, 9th ed., vol. ii., s. 1108, from Emerigon, gives no ground of abandonment. But if the taking of the vessel, lawful or unlawful, out of the possession of the owner was, at the date of the commencement of the owner's action to enforce his notice of abandonment, a taking which still continued in operation, and the owner's loss of the use and disposal of the ship, once total, was at that date one which might be permanent, and was, at any rate, of uncertain continuance, the owner who had duly given notice of abandonment was held by English law entitled to recover upon his insurance for a constructive total loss.

In giving judgment in *Goss* v. *Withers* (1) Lord Mansfield, in a passage which is quoted by Lord Halsbury in *Andersen* v. *Marten* (2), observed: "The ship is lost by the capture though she be never condemned at all, nor carried into any port or fleet of the enemy; and the insurer must pay the value." And again at p. 696 his Lordship said: "The better opinion of the books 'sufficit semel extitisse conditionem, ad beneficium assecurati, de amissione navis; etiam quod postea sequeretur recuperatio; nam per talem recuperationem non poterit praejudicari assecurato.'"

In *De Mattos* v. *Saunders* (3) Willes J., in a passage which is quoted in the judgment of the Privy Council in *Cossman* v. *West* (4), said: "The cases cited of hostile seizure and condemnation by a Prize Court have no application. In such a case the original seizure is prima facie a total loss." . . . . "A vessel by being captured is certainly lost to its owner; but, as in one case where the question arose, a vessel may be taken and retaken before any one knows of the loss, and as the contract of insurance is mainly a contract of indemnity, one can see how the Courts would struggle against a large profit being made out of such a

(1) 2 Burr. 683.
(2) [1908] A. C. at p. 340.
(3) L. R. 7 C. P. 570, 579.
(4) 13 App. Cas. 160, 179, 180.

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contract." (Per Lord Halsbury L.C., *Sailing Ship "Blairmore" Co.* v. *Macredie.* (1)) Marshall, in his standard work on the Law of Marine Insurance, p. 403 (4th ed., 1861), after adverting to the law of France, which then fixed a period of six months before an arrest of a ship in Europe could be treated by the owner as a total loss, proceeds: "In England, the rule is more just, for there, from the moment of a capture or arrest, the owners are considered as having lost their power over the ship and cargo and are deprived of the free disposal of them; because, in the opinion of the merchant, his right of disposal being suspended or rendered uncertain, it is equivalent to a total deprivation; it is therefore unreasonable to oblige the insured to wait the event of a capture, detention or embargo."

But whilst, if the law to be applied was the law as it stood before the Marine Insurance Act, 1906, came into force, I should, as I have said, have held upon the facts as I understand them that the plaintiffs were entitled to succeed in this action, we have now to consider the case as the law has been established by the relevant provisions of that Act. It is an Act, as appears by its title, to codify the law relating to marine insurance; but if the Court finds that in plain and unambiguous language it has altered pre-existing law, its duty is to decide in accordance with the change.

The section which governs the present case is s. 60, sub-ss. 1 and 2. So far as it relates to a constructive loss by capture that section runs thus: "(1.) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable . . . . (2.) In particular there is a constructive total loss—(i.) where the assured is deprived of the possession of his ship . . . . by a peril insured against and (*a*) it is unlikely that he can recover the ship."

One may, I think, without disrespect, express some regret that the two expressions "reasonably abandoned on account of its actual total loss appearing to be unavoidable" and "unlikely that he can recover the ship" should be used apparently to describe the same position of things; for in my view, at any

(1) [1898] A. C. 593, at p. 599.

rate, it is one thing to predicate that a total loss of a thing reasonably appears to be unavoidable and another to predicate that its recovery is unlikely. Taking, however, the latter and, as it seems to me, the less severe test of the right to treat a capture as constituting a constructive total loss, I think that the statute has modified the pre-existing law to the disadvantage of the assured. One is always properly afraid of incompleteness in attempting a definition; but I venture to say that the test of "unlikelihood of recovery" has now been substituted for "uncertainty of recovery." The assured must now show two things: the first, that he has been deprived of the possession of his ship; the second, that it is unlikely that he can recover it. Whence the statute derived the phrase "unlikely that he can recover" as expressing a necessary condition of the assured's right to recover for a constructive total loss by capture I do not know. I have referred to many of the reported capture cases, and I have been unable to find it used judicially in any of them; but there it stands in the section of the Act of Parliament; its meaning is quite clear, and therefore in the present case, to enable the plaintiffs to succeed, they must establish fully (1.) that at the date of the commencement of this action they were deprived of the possession of the *Polurrian;* and (2.) that it was not merely quite uncertain whether they would recover her within a reasonable time, but that the balance of probability was that they could not do so.

They have, as my brother Pickford has held, and I quite agree with him, made the first point good—the Greek captors did deprive the plaintiffs of the possession of their ship. Have they also shown that there was more likelihood that the plaintiffs would not, than that they would, recover her? The test is, in my humble judgment, one the application of which in this case is, and generally, in similar cases of capture, would be, very difficult to apply with any sense of satisfaction, because it necessarily involves conjecture and speculation as to what is likely to be the outcome of a number of possible contingencies. Addressing myself, however, to the best of my ability to the question which this s. 60 directs me to consider, my conclusion is that whilst I hold that on

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October 26—the crucial date, because the date of the commencement of the plaintiffs' action — the recovery of the *Polurrian* by her owners was quite uncertain, I do not feel myself justified in holding that the balance of probabilities has been proved to me so clearly against her recovery that I can say that such recovery was "unlikely." This being so, the plaintiffs must be held to have failed to make out their case, and this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Botterell & Roche, for Vaughan & Roche, Cardiff; Parker, Garrett & Co.*

H. C. R.

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[1914 H. 2419.]

Husband and Wife—Marriage Settlement—Chattels assigned to Trustees—Wife entitled to User—Detention by Husband—Action by Wife—Trustees not joined.

By a marriage settlement a husband assigned to trustees certain chattels upon trust to allow them to be used by the wife during her life free from the control of her husband. In an action by the wife against her husband for the wrongful detention of the chattels:—

Held, that the action could be maintained by the wife without joining the trustees of the settlement as parties.

ACTION tried by Shearman J. without a jury.

The plaintiff was the wife of the defendant. She claimed the return of certain chattels, consisting of furniture and household effects, alleged to be wrongfully detained by the defendant, and damages for the wrongful detention.

By a marriage settlement the defendant as settlor assigned to trustees the furniture and household effects then being in, on, or about his residence "upon trust to allow the same to be used" by the plaintiff "during her life free from the control, debts, or engagements of any husband." The chattels in question were alleged by the plaintiff to be some of those included in the settlement.

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Hinde, for the defendant. There is a preliminary objection to the plaintiff's claim. The property in the chattels is in the trustees of the settlement, and as they are not parties to the action it cannot be maintained.

R. F. McCall (*J. B. Melville* with him), for the plaintiff.

SHEARMAN J. This is an action brought by a wife against her husband in which it is alleged that the wife has the right as against her husband to the possession of certain chattels. The plaintiff claims the return of the chattels and damages for their wrongful detention. The plaintiff's right to the property depends on a marriage settlement, the parties to which were the plaintiff, the defendant, and two trustees. By this settlement certain furniture and household effects were assigned to the trustees upon trust to allow the same to be used by the plaintiff during her life free from the debts or control of her husband. It is clear that the effect of the settlement is to make the property the separate estate of the wife for her life.

An objection has been taken on behalf of the defendant that the action is not maintainable on the grounds that the trustees are not parties to it, and the plaintiff cannot sue in her own name It is well settled that a husband and wife can make an arrangement of this kind without the intervention of trustees, but there does not appear to be any authority that if there are trustees the wife can sue alone in her own name. I think the authorities show that it is the general policy of the law to allow a married woman to sue in respect of her separate estate without cumbering the action by adding trustees as parties. In *Larner* v. *Larner* (1) it was held that apart from the special procedure provided by s. 17 of the Married Women's Property Act, 1882, for determining questions between husband and wife as to the possession of property, a wife can sue her husband for certain torts affecting her property, including an action for the wrongful detention of a chattel. It is true that in *Larner* v. *Larner* (1) the claim of the wife did not depend on a settlement, and, therefore, no question arose as to the necessity of joining trustees as plaintiffs, but the decision shows that an action will lie at the suit

(1) [1905] 2 K. B. 539.

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of a wife against her husband for the wrongful detention of her personal property. Now, the only title which it is necessary for a plaintiff to allege in order to maintain an action in detinue is a title to the immediate possession of the goods. I am of opinion that the plaintiff has a title to the immediate possession of the chattels claimed by her, because the trustees of the settlement only hold them in trust to allow them to be used by her, and it is impossible for them to be used by her unless she has an immediate right to claim possession of them from the trustees. I, therefore, hold that the plaintiff is entitled to maintain this action against her husband without joining the trustees of the settlement as parties.

Objection overruled.

Solicitors for plaintiff: *Wetherfield, Son & Baines.*
Solicitors for defendant: *S. Myers & Son.*

F. O. R.

END OF VOL. I.